Supreme Court, U.S.
FILED
992028 JUN 19 2000
OFFICE OF THE CLERK

No. ——

IN THE
Supreme Court of the United States

JANE DOE, A MINOR, BY HER PARENTS AND NEXT FRIENDS, JOHN DOE AND JUNE DOE, PARENTS,

Petitioners,

v.

ARLINGTON COUNTY SCHOOL BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN F. KARL, JR.*
JODI T. TUER
MCDONALD & KARL
900 17th Street, N.W.
Suite 1250
Washington, D.C. 20006
(202) 293-3200

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

71 pp

QUESTIONS PRESENTED

1. Whether the Fourth Circuit erroneously placed the burden of proof under the Individuals with Disabilities Education Act ("IDEA") on the parents challenging education placements at the administrative level and again in court, in contrast to the better reasoned approaches taken by the majority of the Courts of Appeal and the Supreme Court of New Jersey.

2. Whether the Fourth Circuit erred in affirming the District Court's refusal to consider the evidence sought and that proffered by Petitioners, and whether its ruling contradicts the express provisions of IDEA and this Court's decision in *Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, (1982), and conflicts with the decisions of most of the Courts of Appeal considering the issue.

3. Whether the Fourth Circuit erroneously characterized Petitioners' claim of systemic violations of §504 and §1983 as "derivative" of the IDEA claims and denied Petitioners a jury trial on these claims, as required under *Lytle v. Household Mfg., Inc.,* 494 U.S. 545 (1990), on the spurious grounds of failure to exhaust administrative remedies.

PARTIES TO THE PROCEEDINGS

The following parties were plaintiffs in the District Court and were allowed to proceed under pseudonyms of Jane Doe, John Doe and June Doe.

The following parties were defendants in the District Court: The Arlington County [Virginia] School Board and Alvin Crawley. Claims against Mr. Crawley were dismissed by the District Court and Mr. Crawley is not a party to this Petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY AND REGULATORY PROVISIONS	2
Individuals With Disabilities Education Act ("IDEA").	2
20 U.S.C. § 1415. Procedural safeguards	2
(a) Establishment of procedures	2
(b) Types of procedures	2
(f) Impartial due process hearing	3
(1) In general	3
(g) Appeal	3
(i) Administrative procedures	3
(1) In general	3
(A) Decision made in hearing	3
(B) Decision made at appeal	4
(2) Right to bring civil action	4
(A) In general	4
(B) Additional requirements	4

TABLE OF CONTENTS—Continued

	Page
29 U.S.C. § 794. Nondiscrimination under Federal grants and programs	4
(a) Promulgation of rules and regulations	4
(b) "Program or activity" defined	5
42 U.S.C. § 1983. Civil action for deprivation of rights	5
INTRODUCTION AND STATEMENT OF THE CASE	6
1. *Jane Doe's Educational Program*	7
2. *The Administrative Hearings and Decisions*	10
3. *The School Board's Policies and Practices*	11
4. *Judicial Proceedings*	13
REASONS FOR GRANTING THE PETITION	15
I. THE FOURTH CIRCUIT ERRONEOUSLY PLACED THE BURDEN OF PROOF ON THE PARENTS AT THE ADMINISTRATIVE LEVEL AND AGAIN IN COURT ON THE PARENTS IN CHALLENGING THE ADMINISTRATIVE DECISION, IN CONTRAST TO THE BETTER REASONED APPROACHES TAKEN BY THE MAJORITY OF THE COURTS OF APPEAL AND SUPREME COURT OF NEW JERSEY	18

TABLE OF CONTENTS—Continued

Page

II. THE FOURTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO CONSIDER EVIDENCE PROFFERED BY PETITIONERS AND ITS RULING DIRECTLY CONTRADICTS THE PROVISIONS OF IDEA AND CONFLICTS WITH THE DECISIONS MADE BY OTHER COURTS OF APPEAL 22

III. THE DISTRICT COURT ERRONEOUSLY CHARACTERIZED PETITIONERS' CLAIM OF SYSTEMIC VIOLATIONS OF § 504 AND § 1983 AS "DERIVATIVE" OF THE IDEA CLAIMS AND DENIED PETITIONERS A JURY TRIAL ON THESE CLAIMS ON THE SPURIOUS GROUNDS OF FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES 27

CONCLUSION 30

TABLE OF AUTHORITIES

Cases Page

Alamo Heights Indep. Sch. Dist. v. Bd. Of Educ., 790 F.2d 1153 (5th Cir. 1988) 11
Barnett v. Fairfax County Sch. Bd.., 927 F.2d 146 (4th Cir.), *cert. den.*, 502 U.S. 859, 116 L.Ed.2d 138, 112 S. Ct. 175)(1991)..... 19
Capistrano Unified Sch. Dist v. Warterberg, 59 F.3d 884 (9th Cir. 1995) 24
Carlisle Area School v. Scott P., 62 F.3d 520 (3d Cir. 1995);..... 18, 19
Charlie F. v. Board of Educ. Of Skokie Sch. Dist., 98 F.3d 989 (7th Cir. 1996)..... 28-29
Christopher W. v. Portsmouth Sch.Comm., 877 F.2d 1089 (1st Cir. 1989)..... 28
Clementon School Dist., 995 F.2d 1204 (3rd Cir. 1993) 16
Clyde K v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994). 19
Curtis v. Loether, 415 U.S. 189 (1974)..... 29
Doe v. Board of Education of Tullahoma City Schools, 9 F.3d 455, 458 (6th Cir), *cert. den.*, 511 U.S. 1108, 128 L.Ed.2d 665, 114 S. Ct. 2104 (1994)..... 18
Doyle v. Arlington County Sch. Bd., 953 F.2d 100 (4th Cir. 1991)..... 19
E.S. v. Independent Sch. Dist., 135 F.3d 566 (8th Cir. 1998)..... 19
Fuhrmann v. East Hanover Bd. Of Educ., 993 F.2d 1031 (3d Cir. 1993)..... 19
Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir.) 20
Heather S. v. Wisconsin, 125 F.3d 1045 (7th Cir. 1997) 19
Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982)..... 17, 22-23

TABLE OF AUTHORITIES—Continued

Page

Johnson v. Ind. School Dist., 921 F2.d 1022 (10th Cir. 1990), *cert. den.* 500 U.S. 905, 114 L.Ed.2d 80, 111 S. Ct. 1685 (1991) 18

Lascari v. Board of Educ. of Ramapo Indian Hills Regional High Sch. Dist., 116 N.J. 30, 560 A.2d 1180 (1989) 21

Lenn v. *Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993) 24

Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990) 1, 17, 29

Mavis v. Sobol, 839 F. Supp. 968 (N.D.N.Y. 1993) 21, 26

Metropolitan Gov't of Nashville v. Cook, 915 F.2d 232 (6th Cir. 1990) 26

Murray v, Montrose County Sch. Dist., 51 F.3d 921 (10th Cir. 1995) 24

Oberti v. Board of Educ., 995 F.2d 1204 (3d Cir. 1993) 20-22

Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467 (9th Cir. 1993) 25

Salley v. St. Tammany, 57 F.3d 458 (5th Cir. 1995) 18

Sims v. Apfel, 68 *U.S.L.W.* 4470 (June 5, 2000) 29

Susan N. v. Wilson School District, 70 F.3d 751 (3rd Cir. 1995) 25

Teague Indep. Sch. Dist. v. Todd L:, 999 F.2d 127 (5th Cir. 1993) 24

Thomas v. Denny's, Inc., 111 F.3d 1506 (10th Cir. 1997) 29

Town of Burlington v. Department of Educ. For Com of Mass., 736 F.2d 773, *aff'd on other grounds*, 471 U.S. 359, 105 S. Ct. 1996, 85 L.Ed.2d 385 (1985) 25-26

TABLE OF AUTHORITIES—Continued

Page

Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119 (2d Cir. 1998).....18, 21

Wall v. Mattituck-Cutchogue School District, 945 F. Supp. 501 (E.D.N.Y. 1996). 21, 27

Weber v. Cranston School Comm. ___F.3d ____, (1st Cir. May 8, 2000)..... 28

Witte v. Clark County Sch.Dist., 197 F.3d 1271 (9th Cir. 1999)..... 28

STATUES

Individuals *with* Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et. seq.*, as amended by the IDEA Improvement Act of 1997, Public Law No. 105-17 ..... *passim*

Rehabilitation Act of 1973, 29 U.S.C. § 794, *et. seq.* ..... *passim*

Civil Rights Act of 1871, 42 U.S.C. § 1983 ..... *passim*

28 U.S.C. § 1254(1)..... 2

REGULATIONS

34 C.F.R. § 300.550(b) (1) (1999)..... 15, 16

34 C.F.R. § 300.552(e)..... 16

64 Fed. Reg. 12,457 and 12,458 (1999) (to be codified at 34 C.F.R. 300.552 (e)..... 7

MISCELLANEOUS

National Council on Disability, *Back to School on Civil Rights - Advancing the Federal Commitment to Leave No Child Behind*, (Government Printing Office 2000) at 8..... 16

M.L. Yell, *The* Law *and Special Education*, (Prentice Hall, Inc. 1998) at 246, 250..... 16

IN THE

Supreme Court of the United States

No. _____

JANE DOE, A MINOR, BY HER PARENTS AND NEXT FRIENDS,
JOHN DOE AND JUNE DOE, PARENTS,
Petitioners,

v.

ARLINGTON COUNTY SCHOOL BOARD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner Jane Doe and her parents, John and June Doe, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on March 20, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals (1a)[1] affirming the lower court's opinion is not reported. The District Court's March 18, 1999 opinion granting the motion for summary judgment filed by the Arlington County School Board ("the

---

[1] References to the Appendix to this Petition are "a" followed by the page number.

School Board") is reported at 41 F. Supp. 2d 599 (E.D. Va. 1999). (5a). The District Court's January 8, 1999 Order rejecting Petitioner's request to present additional evidence and ruling that the case would be decided on the administrative record is unreported. (25a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

Individuals With Disabilities Education Act ("IDEA")[2]

20 U.S.C. § 1415. Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this part shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include-

* * *

---

[2] The IDEA was amended by Congress and enacted into law on June 4, 1997 and subsequently recodified. The references made herein are to the recodified IDEA.

(6) an opportunity to present complaints with respect to any manner relating to identification, evaluation or educational placement of the child, or the provision of a free appropriate public education to such child;

* * *

(f) Impartial due process hearing

(1) In general

Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

* * *

(g) Appeal

If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such hearing may appeal such findings and decision to the State education agency. Such agency shall conduct an impartial review of such decision. The officer conducting the review shall make an independent decision upon the completion of such review.

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) of this section and paragraph (2) of this subsection.

(B) Decision made at appeal

A decision made under subsection (g) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(B) Additional requirements

In any action brought under this paragraph, the court

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

* * *

29 U.S.C. § 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 7(8), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the

benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.

* * *

(b) "Program or activity" defined. For the purposes of this section, the term "program or activity" means all of the operations of--

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 14101 of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

INTRODUCTION AND STATEMENT OF THE CASE

This case arises from efforts by Petitioners to have their daughter mainstreamted, *i.e.*, educated in a regular classroom with other students her age and to vindicate their statutory right to administrative and judicial review of the decisions by the School Board rejecting their requests. Petitioners exhausted their administrative remedies and appealed to the District Court two administrative decisions which affirmed the placement decision of the School Board.

Individuals With Disabilities Education Act ("IDEA") is a comprehensive federal education statute which grants disabled students the right to a public education, provides financial assistance to states meeting their educational needs, and conditions a state's federal funding on its having in place a policy that ensures a "free public education" is available to all children with disabilities. 20 U.S.C.§ 1412 (a)(1).

This case presents the fundamental question of the proper role of the federal district court in exercising its statutory duty pursuant to IDEA to receive the records of the administrative proceedings, to hear additional evidence at the request of the parties, and based upon a preponderance of the evidence grant such relief as the court determines is appropriate.

The IDEA mandates that school systems provide to school age children with disabilities special education services to meet their unique needs. IDEA provides extensive procedural safeguards to ensure the full participation of a disabled child's parents in the formulation of their child's individualized education plan (IEP). IDEA provides both parents and school systems access to administrative procedures to resolve IEP disputes. 20 U.S.C. § 1415(f).

Either party aggrieved by the state administrative decision may bring a civil action in a federal district court. Jurisdiction is conferred upon the federal district court by 20 U.S.C. § 1415 (i)(2)(A).

The IDEA specifically requires that to the maximum extent appropriate, handicapped children "are educated with children who are not handicapped." 20 U.S.C. § 1412(a)(5)(B). Moreover, the eligibility requirements of the IDEA provided that the removal of handicapped children from the regular classroom occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

"A child with a disability is *not* removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum." *64 Fed Reg.* 12,457, 12,458 (to be codified at 34 C.F.R. § 300.552(e)) (emphasis added). The regulations make clear that the type or degree of modifications to the general curriculum that a child may need should not be used by the agency to inappropriately justify the child's removal from education in the regular classroom. *Id.*

Petitioners alleged that the School Board, in addition to violating the IDEA, also discriminated against Jane Doe under § 504 of the Rehabilitation Act and that the School Board's denial of an appropriate "mainstream" education to Jane Doe resulted from an official "policy or custom" of the Board in violation of §1983.

1. ***Jane Doe's Educational Program.*** Jane Doe, now twelve years old, suffers from neurodevelopmental dyspraxia and attention deficit hyper-activity disorder (ADHD). She has been labeled as mentally retarded by the School Board. Administrative Record ("A.R.") 222-224, 349. Physically, Jane Doe is a normal child, A.R. 103, 213, and is "a

delightful little girl who is very eager to participate in the educational environment" at Arlington Traditional School ("ATS"). A.R. 218.[3]

In 1993, Jane Doe was accepted at ATS for kindergarten along with her twin sister under the lottery system used to determine who attended. From the onset of her admission to ATS, the School Board sought to isolate Jane Doe from her peers. Holly Hawthorne, the principal, wanted to place Jane Doe in an early childhood development class—a county-wide special education segregated classroom setting for children with severe handicaps. A.R. 95.

Jane Doe academically performed better in group settings with her non-disabled peers, as opposed to individual one-on-one instruction. For example, prior to January 1995, Jane Doe was receiving individual services for speech and language instruction. A.R. 245. In late January-February 1995, Jane Doe began receiving speech and language instruction in a group setting. *Id.* The school's Speech-Language Pathologist noted that "[s]ince she became a part of the group, noncompliant behavior has decreased significantly. She appears to enjoy the group setting and has become an active and enthusiastic participant." *Id.* Since being placed in a self-contained setting, Jane Doe's test scores dropped significantly. A.R. 202 - 205, 221, 272, 273, 278.

While Jane Doe was in first grade, she participated in all classroom activities with non-disabled peers; attended art, music, and Physical Education with her classmates; received Science and Social Studies instruction with her non-disabled peers, and received the majority of her Language Arts and Math instruction in the classroom with modifications and adaptions to the curriculum. A.R. 202. In her Educational Evaluation Triennial Assessment dated March 18, 1996, it

---

[3] The reference is to the Administrative Record.

was noted that "[s]ocial behaviors in the classroom setting have improved markedly." *Id.* Jane Doe is "usually cooperative, stays at her desk, and attempts to follow classroom routines and completes class work." *Id.*

After first grade, in June 1996, an IEP was established for Jane Doe under which she would receive only speech services (75 minutes each week) and occupational therapy (60 minutes each week) in a special education setting. A.R. 32. All other education was to be provided in the general education classroom, including 12 - 14 hours of special education services. *Id.* To facilitate implementation of the June 1996 IEP, Petitioners obtained a complete independent educational analysis, including speech, educational, neurological, and psychological evaluation. A.R. 356.

As a result of the independent educational analysis, Jane Doe was diagnosed with neuro-developmental dyspraxia. A.R. 222-224, 349. However, a Special Education Committee refused to accept this classification and rather than implement Jane Doe's agreed-upon June 1996 IEP at ATS, ACPS officials attempted to immediately place the child in another school.

Because Jane Doe enjoyed interacting with her peers at school and thrived in the social opportunities such an environment provided, her parents attempted to maximize her inclusionary treatment and mainstream activities at school. However, in October 1996, only months after ACPS determined that Jane Doe should only receive 12 to 14 hours of special education services in the general education classroom rather than in a self-contained setting, the School Board developed and implemented a new IEP mandating that almost all of Jane Doe's education be provided in a self-contained setting. The Petioners never agreed to this IEP. A.R. 33.

A Due Process Hearing was requested by Petitioners because the School Board wanted to implement the October 1996 IEP in another school, rather than in Jane Doe's home "magnet" school. Petitioners also requested that their daughter receive mathematics, handwriting, and language arts instruction in a regular classroom with supplemental services and curriculum modifications. A.R. 351, 356. The parents made several attempts to negotiate and work with the school system administrators, teachers, and staff resources before, during, and after due process procedures to get ATS to mainstream Jane Doe. A.R. 356. The School System simply refused to comply. *Id.*

2. The Administrative Hearings and Decisions. In April 2, 1997, Administrative Hearing Officer Maxson upheld the validity of the "latest" [October 1996] IEP for Jane Doe, despite the fact that her parents protested it. A.R. 437. Petitioners appealed portions of this decision to a State Level Review since it did not conform to the evidence on the record and requested that the October 1996 IEP be implemented in regular classrooms.

On August 21, 1997, Administrative Hearing Officer Baugh who had conducted the State Level Review, affirmed the April 2, 1997 decision but also initiated yet another un-agreed-to IEP. In addition to the legal errors, Mr. Baugh erred by ignoring the objective evidence presented by the Petitioners and their witnesses and instead relied upon the views of Jane Doe's second grade teacher who, in addition to having no training dealing with special education and mainstreaming of handicapped students, simply did not want to accommodate Jane Doe in her class. A.R. 467. Mr. Baugh's decision contains numerous errors of fact and law and also fails to take into consideration the changes mandated by the IDEA Improvement Act of 1997, Public Law. No. 105-17.

The administrative hearings held to review Jane Doe's educational placement were conducted by Hearing Officers appointed by the Virginia Supreme Court to hold hearings in a wide variety of cases. *Regulations Governing Special Education Programs for Children with Disabilities in Virginia,* §3.4 Procedural Safeguards, ¶A.6 at 33. The Hearing Officers who hear special education cases are appointed from a list maintained by the Office of the Executive Secretary of the Supreme Court and receive very limited training from the Virginia Department of Education. *Rules of the Virginia Supreme Court: Hearing Officer System*, Rule Three (B). The Hearing Officers are paid $75 per hour. *Id.* Rule Six (B)

The procedures followed in the administrative hearings lacked the safeguards provided by the rules of evidence and hearsay was freely admitted. *Rules of the Virginia Supreme Court: Hearing Officer System*, Rule Four. While parents of handicapped students are advised they may proceed *pro se*, they are ***not*** advised that witnesses who are not called in administrative hearings will not be allowed to testify in court. Virginia Dep.'t of Education, "The Special Education Due Process Hearings (undated).

In this case, both Hearing Officers placed the burden of proof under the IDEA on Petitioners to establish that the educational placement proposed by ACPS was inappropriate. The first Hearing Officers based his analysis on the legal conclusion that "IDEA contains a presumption in favor of the placement contained in a school systems's IEP." J.A. at 1038-1039, citing *Alamo Heights Indep. Sch. Dist. v. Bd. Of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1988).

3. *The School Board's Policies and Practices.* The School Board has long had a policy of non-compliance with the IDEA. The principal written evidence of this unlawful policy is contained in a Memorandum from the Director, Student Services, and Deputy Director of Special Education dated

November 2, 1993. (27-a). This internal memorandum prepared by the ACPS Special Education Department was sent to then-School Superintendent Arthur W. Gosling informing him that ACPS' "current practice of placing students into self-contained classes does not seem defensible when held to the standard of least restrictive environment." Attached to the memorandum was a paper prepared by the Special Education Department outlining the current status of special education in Arlington Schools. It stated that "Examination of the numbers of students in self-contained classes supports the conclusion that this is the Arlington delivery model of choice." The paper called for a change in the School Board's policies.

In response, School Superintendent Gosling, recognizing inadequacies in Respondent's programs, unequivocally agreed that the School Board's "practices [in the area of Special Education] are ***inconsistent with these nationwide trends as well as with recent court decisions***." (28a) (emphasis added). Superintendent Gosling stated to the administrative staff that: "Self-contained classrooms and services as cornerstones of our program delivery strategies **no longer are acceptable**." *Id.*

As a result of the systemic deficiencies in the School Board's practices in providing special education services to disabled children, ACPS began in 1994 to implement a Five Year Plan for the Integration of Special Education Students. The Office of Special Education noted in its memorandum that "careful examination of the large numbers of students being served in restrictive environments requires change." (30a). Thus, as early as November 1993 when these "Smoking Gun" memoranda were written, ACPS knew about serious systemic deficiencies in its special education program, as evidenced by the internal "Smoking Gun" memorandum prepared by the ACPS Special Education Department and that

self-contained classrooms such as the ones offered Jane Doe, were unacceptable. These documents demonstrate that the School Board knowingly failed to comply with IDEA and §504.

Notwithstanding this unambiguous recognition of deficiencies in the School Board's Special Education program, the School Board continued its custom or practice of failing to enforce the IDEA and §504 of the Rehabilitation Act by only slowly modifying its policies over an extended period of time through its five-year plan. The need for such a plan and, indeed, the very existence of such a plan is compelling evidence that the School Board is not in compliance with the law. The Board's refusal to provide Jane Doe with an appropriate education in a general classroom setting is simply a manifestation in the case of one individual of the School Board's systemic failure to comply with the IDEA. Rather than engage in a careful child-by-child analysis of the proper placement, the School Board places a very large number of students in self contained class rooms under the pretext that this is in the best interest of the child. The Board's policy is contrary to the mandatory "least restrictive environment," required by law.

4. Judicial Proceedings. Following exhaustion of administrative remedies, Petitioners brought suit in U.S. District Court under IDEA, §504 and §1983. Petitioners designated Dr. Jerome Bruns, who for 21 years was Director of Student Services for the Falls Church School System, as their expert witness. Dr. Bruns believes in mainstreaming handicapped students and had extensive experience in implementing IDEA.

Dr. Bruns evaluated and observed Jane Doe in her self-contained classroom setting at ATS. In his deposition, he testified that he observed a child who was attentive, on task, not difficult to direct, and who responded to a variety of situations in a normal fashion. He concluded that Jane Doe

would not be identified as a child with special needs. Dr. Bruns reached conclusions opposite from those of the Hearing Officers and testified that Jane Doe would benefit both academically and socially if she received her core academic subjects in the general education classroom.

However, on January 8, 1999, prior to granting the School Board's Motion for Summary Judgment, the District Court ruled that the case would be decided on the administrative record and removed the case from the trial docket. (25a). Dr. Bruns' insightful contributions to the dispute were excluded. Judge Hilton, in rejecting Petitioner's request to present additional evidence, stated, "the Court finds what plaintiffs seek to produce is not additional evidence to amplify or clarify the evidence in the administrative record. Rather, Plaintiffs seek to present evidence available at the time of the administrative hearings, but which they chose not to present at that time." *Id.* The Court found there were "no issues of material fact in dispute and this case is ripe for summary judgment." The Court also rejected Petitioners' appeal from the decision of the Magistrate Judge denying them an opportunity to take a deposition of the School Board pursuant to Fed.R.Civ.P. 30(b)(6). *Id.*

The District Court ruled that: "Matters which were not raised in the state administrative hearings are precluded from being raised in this Court." (26a). Although acknowledging that additional evidence may be presented, the District Court ruled that "the admission of additional evidence contemplated by 20 U.S.C. § 1514(e)(2) should not be allowed when it would "reduce the proceedings before the state agency to a mere dress rehearsal by allowing appellants to transform the Act's judicial review mechanism into an unrestricted trial de novo." *Id.* (citation omitted).

In issuing its Memorandum Opinion granting the School Board's Motion for Summary Judgment, the District Court

stated: "The Court has previously ruled that no facts are in dispute and this case should be decided on the administrative record." (5a). The District Court ruled that Petitioners again carried the burden of proving the administrative decisions were inaccurate, but that Petitioners could not present additional evidence to the Court. The District Court ruled that Petitioners' §504 and §1983 claims were "derivative" of their IDEA claims. (18a) The Court dismissed the §504 claims for failure to completely exhaust administrative remedies and ruled, notwithstanding the Smoking Gun memoranda, that Petitioners failed to prove their §1983 claims.

The Court of Appeals for the Fourth Circuit affirmed, stating: "Administrative findings in an IDEA case 'are entitled to be considered prima facie correct." (2a) (citation omitted). The Court of Appeals accepted the District Court's view of the evidence supporting the hearing examiner. *Id.* The Court of Appeals also affirmed the District Court's rejection of Petitioner's §504 claims on the grounds that such claim was both "derivative" of the IDEA claim and waived for failure to fully exhaust administrative remedies. The Court of Appeals affirmed the dismissal of the §1983 claims because Petitioners did not prevail on their IDEA and §504 claims. *Id.* The Court of Appeals rejected Petitioners' other arguments and affirmed "for the reasons stated by the district court."(3a).

REASONS FOR GRANTING THE PETITION

It is of vital importance that parents of students with disabilities who are aggrieved by refusal of their school system to comply with IDEA be permitted full and unfettered access to federal courts. IDEA expressly guarantees parents the right to judicial review of local school board decisions refusing to mainstream their children and the right to introduce evidence in the district court.

IDEA creates a presumption that students who are disabled should be mainstreamed, that is, students with disabilities should be educated in the same classroom as their nondisabled peers. However, according to the National Council on Disabilities, thirty-six states currently fail to ensure that children with disabilities are not segregated from regular classrooms. National Council on Disability, *Back to School on Civil Rights-Advancing the Federal Commitment to Leave No Child Behind*, (Government Printing Office 2000) at 8.

Almost six million children and young people with disabilities, who are ages three through twenty-one, qualify for educational intervention under IDEA. *Id.* at 6. Many of these children and young people with disabilities file administrative appeals and lawsuits as a result of the school systems' failure to comply with IDEA by establishing appropriate IEPs for the students who qualify for special assistance under IDEA. *Id.* at 7. "[F]ew areas in special education have been the subject of more debate and controversy" than whether handicapped children are placed in appropriate environment. M.L. Yell, *The Law and Special Education*, (Prentice Hall, Inc. 1998) at 246, 250.

Thus, resolution of the issues raised in this Petition will determine the manner in which IDEA is implemented and whether parents seeking to exercise their right to judicial review of their children's IEP's will have meaningful access to the courts. These issues affect the education received by the almost six million children and young people with disabilities.

The Court should grant review of the first question presented because of the importance of the issue and because there is a split among the Circuits as to which party bears the burden of proof in an administrative and judicial challenges to the IEP prepared by the school system.

The Fourth Circuit's approach effectively denies Petitioners and others similarly situated any meaningful opportunity to exercise their statutory right to appeal adverse educational placement decisions to district court pursuant to 20 U.S.C. §1415(e)(2) and is contrary to the standards articulated by many United States Courts of Appeal and the Supreme Court of New Jersey.

The Court should grant review of the second question presented because there is a split in the Circuits regarding the meaning of this Court's decision in *Hendrick Hudson Central School District v. Rowley*, 456 U.S. 176 (1988), and what additional evidence a District Court should consider in litigation brought under IDEA. The Fourth Circuit's ruling substantially denies Petitioners' statutory right to introduce "additional evidence" to supplement the administrative record guaranteed by 20 U.S.C. § 1415(e)(2) and the opinions of most of the Courts of Appeal.

The Court should grant review of the third question because the Fourth Circuit's analysis of the exhaustion issue deprived Petitioners of their right to a jury trial on their §504 and §1983 claims, as required by this Court's teachings in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990). There is also a split in the Circuits as to whether IDEA's exhaustion of administrative remedies requirement applies to §504 and §1983 claims, where Petitioners have evidence of systemic discrimination and a custom and practice of segregating handicapped students.

If the Fourth Circuit's decision is allowed to stand, it will improperly impair the parents' statutory rights to seek review of decisions regarding education of their handicapped children and thwart the clearly expressed intent of Congress to grant parents the right to meaningful judicial review of decisions made by the school board not to mainstream their handicapped children.

I. THE FOURTH CIRCUIT ERRONEOUSLY PLACED THE BURDEN OF PROOF ON THE PARENTS BOTH AT THE ADMINISTRATIVE AND JUDICIAL LEVELS, IN CONTRAST TO THE BETTER REASONED APPROACHES TAKEN BY THE MAJORITY OF THE COURTS OF APPEAL AND THE SUPREME COURT OF NEW JERSEY.

The Hearing Officer, in accordance with the law of the Fourth Circuit, placed a heavy burden of proof on the parents to prove the School Board erred in failing to mainstream their daughter. The Hearing Office required Petitioners to "establish *both* that the program proposed by the school system is *inappropriate* and that the program which the parents prefer is appropriate." J.A. 1038-1039 (citations omitted)(emphasis in original). This approach, deferring to the decision of the school system, is also taken by the Fifth, Sixth and Tenth Circuits. *Salley v. St. Tammany*, 57 F.3d 458, 467, 5th Cir. 1995) ("The party attacking the IEP bears the burden of demonstrating its inappropriateness."); *Doe v. Board of Education of Tullahoma City Schools*, 9 F.3d 455, 458 (6th Cir) (same), *cert. den.*, 511 U.S. 1108 (1994); *Johnson v. Ind. School Dist. No. 4*, 921 F.2d 1022, 1026 (same) (10th Cir. 1990), *cert. den.*, 500 U.S. 905 (1991).

The Second, Third, Eighth and Nine Circuits, recognizing the emphasis Congress placed on mainstreaming handicapped students, have placed the burden of proof of defending the IEP at the administrative level on the school. *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998); *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995) ("In administrative and judicial proceedings, the school district bears the burden of proving the appropriateness of the IEP it has proposed."), *cert. den.*, 517 U.S. 1135 (1996); *E.S. v. Independent Sch. Dist.*, 135 F.3d

566, 569 (8th Cir. 1998); *Clyde K v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1398 (9th Cir. 1994).

A number of the Courts of Appeal place the burden on the school system at the administrative level, then explicitly place the burden of proof on the party challenging the administrative ruling. *E.g., E.S. v. Independent Sch. Dist.*, 135 F.3d at 569; *Clyde K v. Puyallup Sch. Dist.*, 35 F.3d at 1398.

Here, however, the Court of Appeals held that: "Administrative findings in an IDEA case 'are entitled to be considered prima facie correct. ' " (2a). The Court of Appeals relied on its previous decisions in *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1000-01 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998), and *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991) in reaching this conclusion. *Id.* Placing the burden of proof on the party challenging the administrative decision has long been the law of the Fourth Circuit. *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 152 (4th Cir.), *cert. den.*, 502 U.S. 859 (1991). The Seventh Circuit also places the burden of proof on the party challenging the administrative decision. *Heather S. v. Wisconsin,* 125 F.3d 1045, 1052 (7th Cir. 1997).

The Court of Appeals accepted the district court's view that "the evidence firmly supports both hearing officers' determination that the 'full inclusion' program promoted by the plaintiffs would not meet [Jane's] educational needs for core academic subjects, given her significant cognitive limitations and distractability." (2a). The district court's view of what the evidence "firmly supports" followed from its summary rejection of Petitioners' efforts to introduce into evidence testimony from their expert witness Dr. Bruns, former Director of Student Services at Falls Church School System for 21 years. The District Court also rejected the "Smoking Gun" memoranda.

The Court of Appeals decision that "the Administrative findings in an IDEA case 'are entitled to be considered prima facie correct'," (2a), is in sharp conflict with the analyses by the U.S. Court of Appeals for the Third Circuit. The Third Circuit has unequivocally ruled that the burden of proof should always lie with the school district at the administrative level and in court. *Fuhrmann v. East Hanover Bd. Of Educ.*, 993 F.2d 1031, 1034-1035 (3d Cir. 1993). The Third Circuit recognizes that the issue of burden of proof is even more important when IDEA's mainstreaming is at issue and places the burden of proving compliance with IDEA on the school. *Carlisle, supra*, 62 F.3d at 533; *Oberti v. Board of Educ.*, 995 F.2d 1204, 1219-1220 (3d Cir. 1993).

The *Oberti* Court stated: "indeed, the Act's strong presumption in favor of mainstreaming, 20 U.S.C. 1422(5)(B), would be turned on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom." *Id.* Thus, the *Oberti* Court held that not only does the School Board have the burden at the administrative hearing level of justifying its educational placement of the child, but that the burden of proving compliance with mainstreaming requirement is borne by the school regardless of which party appealed from the administrative decision to bring the claim under the IDEA before the district court. *Id.* Requiring parents to prove at the district court level that the school has failed to comply with the Act would undermine the Act's express purpose "to assure that the rights of children with disabilities and their parents are protected", 20 U.S.C. §1400 (c), and would diminish the effect of the provision that entitles parents and guardians to obtain judicial enforcement of the Act's substantive and procedural requirements. *Id.* at 1219.

Placing the burden on the school system is the only approach consistent with the purpose of IDEA. The *Oberti* analysis also follows from the logical proposition that the burden of proof rests with the advantaged party. When a dispute arises under the IDEA, where the school board is the advantaged party, with better access to information, greater educational expertise, and of course, greater access to witnesses such as teachers and experts in the field of special education, the school board should bear the burden of proof. *Id.* at 1219.

The New Jersey Supreme Court also concluded that the burden of proof should rest on the school board at all stages. *Lascari v. Board of Educ. of Ramapo Indian Hills Regional High Sch. Dist.*, 116 N.J. 30, 44, 560 A.2d 1180, 1188 (1989). The *Lascari* Court held burden of proof is like the procedural safeguards guaranteed by IDEA and that "the allocation of the burden of proof protects the rights of handicapped children to an appropriate education." 116 N.J. at 44, 560 A.2d at 1188. Placing the burdens of persuasion and production on the school district is consistent with the well settled evidentiary proposition that "the party better able to meet those burdens" should bear the burdens of persuasion and production. *Id.*

Several district courts in the Second Circuit have followed the *Oberti* approach, holding that the burden of proof should be placed on the school district because of the "obvious recognition of the school's overarching obligation to attend to the specific educational needs of children with disabilities." *Mavis v. Sobol*, 839 F. Supp, 968, 985 (N.D.N.Y. 1993); *Wall v. Mattituck-Cutchogue School District*, 945 F. Supp. 501 (E.D.N.Y. 1996). The U.S. Court of Appeals for the Second Circuit assumed without deciding that the burden of proof in an IDEA case is on the school board. *Walczak, supra*, 142 F.3d at 134 (school board "demonstrated by a clear preponderance of the evidence" that it complied with IDEA).

As the Third Circuit accurately observed in *Oberti*, "neither *Rowley* not the Act itself specifically addresses which party bears the burden of proof at the district court level, . . ." 995 F.2d at 1218. By requiring that the administrative findings "are entitled to be considered prima facie correct" the Fourth Circuit has, in essence, required that the district court affirm the administrative decision if such decision is supported by "substantial evidence." This interpretation of IDEA's review provision was soundly rejected by this Court's opinion in *Rowley*, *supra*, which rejected the "substantial evidence" standard. The Court should grant this Petition to resolve this important issue where there is a clear split in the Circuits on the burden of proof at both the administrative and judicial levels to establish a nation-wide standard. The Court should grant review because placing the burden of proof on the parents at ***both*** the administrative and judicial levels denies these parents' their statutory right of access to meaningful judicial review of the School Board's decision not to mainstream their daughter. Access to the courts should not be a function of geography.

II. THE FOURTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT'S COURT'S RFUSAL TO CONSIDER EVIDENCE PROFFERED BY PETITIONERS AND ITS RULING DIRECTLY CONTRADICTS THE PROVISIONS OF IDEA AND CONFLICTS WITH THE DECISIONS MADE BY OTHER COURTS OF APPEAL.

IDEA instructs courts reviewing the decisions of state educational agencies to receive the records of the administrative proceedings . . . . ***hear additional evidence at the request of a party***, and, basing its decision on the preponderance of the evidence, . . . grant such relief as the court determines is appropriate." 20 U.S.C.§ 1415(e)(2)

(emphasis added). However, despite this express statutory directive, on January 8, 1999, the District Court granted the School Board's Motion in Limine, barring Petitioners from presenting additional evidence and ruled that the Court's analysis and decision would be based solely on the administrative record. (25 a). This ruling was consistent with the precedent of the Fourth Circuit, that Petitioners could not put on any additional evidence that was not in the administrative record. (9a) (citation omitted). This ruling is inconsistent with the plain language of the statute, this Court's decision in *Rowley*, and the views of most of the Courts of Appeal addressing this issue.

In *Rowley* the school board argued that the administrative findings should be upheld by the district court if supported by substantial evidence. This Court stated:

> Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts. In substituting the current language of the statute for language that would have made state administrative findings conclusive if supported by substantial evidence, the Conference Committee explained that Courts were to make "independent decision[s] based on a preponderance of the evidence. *Rowley* at 205 (citations omitted).

In *Rowley*, the Supreme Court admonished that "courts must be careful to avoid imposing their view of preferable educational methods upon the States." 458 U.S. at 207. This Court explained that the preponderance of the evidence standard was "by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities" and, accordingly, it directed courts to give "due weight" to the administrative process and temper their review with deference to school agencies' expertise. *Id.* at 205-06. The requirement that courts give "due weight" to administrative proceedings obliges the courts

to determine how much weight is "due." *Capistrano Unified Sch. Dist. v. Warterberg*, 59 F.3d 884, 891 (9th Cir. 1995).

The courts that have addressed the issue have recognized the paradoxical position of the district court as both an independent fact finder and a judicial body bound to review and give deference to the findings of an administrative agency. The Circuits have interpreted the directive to give "due weight" to the administrative process in different ways.

As the Court of Appeals for the Ninth Circuit has observed, "judicial review in IDEA cases differs substantially from judicial review of other agency actions, in which courts generally are confined to the administrative record and are held to a highly deferential standard of review." Because IDEA requires a district court to hear additional evidence at the request of a party, a district court "does not use the substantial evidence standard typically applied in the review of administrative agency decisions, 'but instead must decided independently whether the requirements of IDEA are met'." *Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 927 (10th Cir. 1995) (citation omitted).

The Tenth Circuit described the standard of review as a "modified de novo review," or as "involved oversight." *Murray*, 51 F.3d at 927 (citations omitted); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993) ("In explicitly adopting the view that the district court's review of the hearing officer's decision is virtually de novo, we join the First, Seventh, Ninth and Eleventh Circuits."); *Lenn v. Portland School Committee*, 998 F.2d 1083 1086 (1st Cir. 1993) (IDEA "contemplates an intermediate standard of review," which, because it is characterized by independence of judgment, "requires a more critical appraisal of the agency determination than clear-error review entails, but which nevertheless, falls well short of complete de novo review."). The Ninth Circuit suggested a resolution of the "puzzling

procedural problem" presented whenver the district court adjudicates an IDEA action. *Capistrano*, 59 F.3d at 892 (the district court should "read the administrative record, consider the new evidence, and make an independent judgment based on a preponderance of evidence and giving due weight to the hearing officer's determinations.

Thus, the courts of appeal differ in their understanding of the interplay between the Supreme Court's "due weight" interpretation and IDEA's provision for independent judicial review. In this instant case, the Fourth Circuit affirmed the decision of the District Court which adopted the findings made in the administrative process after refusing to consider any of the evidence proffered by Petitioners in the trial court. Thus, the courts below erroneously interpreted *Rowley* to limit IDEA's directive that the district court "shall hear additional evidence at the request of a party."

The Court of Appeals for the First Circuit was the first court of appeals to analyze IDEA's directive that a district court shall hear additional evidence at the request of a party. *Burlington*, 736 F.2d 773, 790, *aff'd on other grounds*, 471 U.S. 359 (1985). The *Burlington* court held that the word "additional" should be construed in the ordinary sense of the word to mean "supplemental." *Id.* Thus construed, IDEA "contemplates that the source of the evidence will be the administrative hearing record, with some supplementation at trial." *Id.* Reasons for supplementation would include, but were not limited to the "unavailability of a witness, an improper exclusion of evidence by the administrative agency and evidence concerning relevant events occurring subsequent to the administrative hearing." *Id.* The Ninth Circuit has also construed "additional" to mean "supplemental." *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1472-73 (9th Cir. 1993.

The Sixth Circuit expressly disagreed with the interpretation of the *Burlington* court and rejected the view that

additional evidence is admissible only in limited circumstances. *Metropolitan Gov't of Nashville v. Cook*, 915 F.2d 232 234, (6th Cir. 1990). The Tenth Circuit adopted a view similar to that articulated by the Sixth Circuit. *Murray*, 51 F.3d at 930-931, & n. 15, holding that additional evidence is generally admissible. Although the District Courts in the Second Circuit are split on the extent to which additional evidence may be admitted, the better reasoned decision allow the parties to present additional evidence. *Mavis v. Sobol*, 839 F. Supp. 968, 969 (N.D.N.Y. 1993) (also discussing the First and Sixth Circuit positions).

The Third Circuit takes an intermediate position, holding that it is not within the trial court's discretion to reject the party's offer of additional evidence without even evaluating it for its admissibility. *Susan N. v. Wilson School District*, 70 F.3d 751, 762 (3rd Cir. 1995).

Nearly all of the Circuits have rejected the rule of law adopted by the Fourth Circuit, which is to refuse to allow testimony in court from all who did, or could have, testified before the administrative hearing. "[A] rigid rule to this effect would unduly limit a court's discretion and construct its ability to form the independent judgment Congress expressly directed." *Burlington, supra,* 736 F.2d at 791. Accordingly, *Burlington* specifically rejected a proposal that would limit expert testimony to the administrative hearing and ruled that expert testimony not presented at the administrative level should be considered by the trial court. *Id.*

In view of the Fourth Circuit's decision which is inconsistent with IDEA and the approach taken by the majority of the courts of appeal, this Court should grant review of the Fourth Circuit's refusal to allow Petitioners to introduce "additional evidence" and reverse the decision restricting judicial review to the administrative record. Since,

as one court observed, "the process for district court review of IDEA actions is conceptually quizzical," *Wall v. Mattituck-Cutchogie School Dist.*, 945 F. Sup. 501, 503 (E.D.N.Y. 1996), the court should end the confusion and disagreement among the courts by accepting this issue for review.

III. THE DISTRICT COURT ERRONEOUSLY CHARACTERIZED PETITIONERS' CLAIM OF SYSTEMIC VIOLATIONS OF §504 AND §1983 AS "DERIVATIVE" OF THE IDEA CLAIMS AND DENIED PETITIONERS A JURY TRIAL ON THESE CLAIMS ON THE SPURIOUS GROUNDS OF FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

Jane Doe's placement in the self-contained class is simply a manifestation of the School Board's policy and practice of segregating those with special educational needs. Rather than engage in a careful child-by-child analysis of the proper placement, the School Board places a very large number of students in self-contained class rooms under the pretext that this is in the best interest of the child. Notwithstanding this unambiguous recognition of serious systemic deficiencies in its Special Education program, the School Board has failed and refused to remedy the problems in the provision of special education services as highlighted in the Special Education Department's memoranda. (27a-31a). Indeed, the School Board has a custom or practice of failing to enforce the IDEA and §504 of the Rehabilitation Act.

IDEA generally requires that for persons seeking relief under §504, to exhaust their administrative remedies to the same extent as would be required had the action been brought under IDEA. 20 U.S.C. §1415(l). However, there is a split in the Circuits as to whether exhaustion would be required under the circumstances present here.

The District Court's ruling that failure to raise the issue of systemic violations §504 and §1983 at the administrative level barred judicial consideration is inconsistent with IDEA for several reasons. First, the regulations governing due process hearings in Virginia do not allow the parents to raise at the administrative hearing issues of systemic or class wide violations of the law. Where the administrative remedies afforded by the due process hearing are inadquate given the relief sought, Petitioners are not required to exhaust their administrative remedies. *Weber v. Cranston School Comm.* ___F.3d ____, (1st Cir. May 8, 2000), slip op. at 12, *citing*, *Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1094 (1st Cir. 1989).[4]

Second, exhaustion is not required, because the Hearing Officers lacked the authority to order the School Board to implement IDEA policies pursuant to the standards discussed in the "Smoking Gun" memoranda. Since the systemic relief sought by Petitioners in their §504 claim was not available in the due process hearings, exhaustion of such claims would be futile and hence is not required under §1415(l). *Weber, supra*, slip op. at 12 and n. 13.

Third, exhaustion under §1415(l) is not required for Petitioners' claims for money damages arising under §504 and §1983 because, by the plain terms of §1415, exhaustion is not required where monetary relief under those statutes is unavailable under IDEA. *Witte v. Clark County Sch.Dist.*, 197 F.3d 1271, 1275, (9th Cir. 1999). *But see, Charlie F. v.*

---

[4] The legislative history of IDEA indicates a particular concern with futility. Senator Williams, the principal author of the Education of the Handicapped Act, the predecessor to IDEA stated that "exhaustion of administrative procedures established under this part should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile, either as a legal or practical matter." *Christopher W, supra*, 877 F.2d at 1094 (citation omitted).

Board of Educ. of Skokie Sch. Dist., 98 F.3d 989, 991 (7th Cir. 1996).

Fourth, exhaustion is not required because Petitioners were not aware of and did not have the Smoking Gun memoranda when they exhausted their administrative remedies. The School Board's successful efforts to keep these memoranda secret prevented the Does from seeking to raise this issue in the administrative proceedings. Requiring exhaustion with respect to a secret policy unlawfully imposes an impossible burden on Petitioners. Requiring Petitioners to have raised this issue in the administrative proceedings, at a time when the Board successfully concealed evidence of its policy of noncompliance with the law would turn the doctrine of administrative remedies on its head.

There is a split in the Circuits as to whether exhaustion is required on claims raised under §504 and §1983, particularly where Petitioners were unaware of the existence of a the School Board's official policy of failing and refusing to comply with the law at the time they exhausted their administrative remedies and where such exhaustion would have been futile. *See, Sims v. Apfel*, 68 *U.S.L.W.* 4470, 4473 (June 5, 2000) (issue exhaustion is not required). This Court should review this case to resolve a conflict among the Courts of Appeal as to whether exhaustion is required.

Petitioners are entitled to a jury trial on their §504 and §1983 claims and these issues should be tried before and decided by a jury, ***prior*** to issues to be decided by the Court, so that their Seventh Amendment rights are not foreclosed on common factual issues. *Lytle v. Household Mfg., Inc., supra*; *Curtis v. Loether*, 415 U.S. 189 (1974); *Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1512-1513 (10th Cir. 1997). If the jury finds that the School Board's policy is contrary to §504 and §1983 and that Petitioners' rights under these laws have been violated, then these findings are binding on the court's analysis of the IDEA claims, which should be decided only

after the jury renders a verdict on Petitioners' damages claim. The Court should grant review of this issue because the decision of the Fourth Circuit is inconsistent with the views of other Courts of Appeal on the issue of exhaustion and inconsistent with the views of this Court on Petitioners' Seventh Amendment right to jury trial.

CONCLUSION

The Petition for a writ of *certiorari* should be granted to resolve these issues of national importance.

Respectfully submitted,

JOHN F. KARL, JR.*
JODI T. TUER
MCDONALD & KARL
900 17th Street, N.W.
Suite 1250
Washington, D.C. 20006
(202) 293-3200

* Counsel of Record

Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1426

March 1, 2000, Argued
March 20, 2000, Decided

JANE DOE, a minor by her parents and next friends; JOHN DOE; JUNE DOE, Parents of JANE DOE,
Plaintiffs-Appellants,

v.

ARLINGTON COUNTY SCHOOL BOARD,
Defendant-Appellee,

and ALVIN CRAWLEY, Director, Student Services Arlington County Public Schools.,
Defendant.

OPINION

Before LUTTIG, WILLIAMS, and MOTZ, Circuit Judges.

PER CURIAM:

After administrative hearings, Jane Doe, by her parents, John and June Doe, brought this action against the Arlington County School Board, pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et. seq.* (1994 & Supp. IV 1998), § 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794 (1998) and 42 U.S.C.A. §1983 (1998 & Supp. 1999). The district court granted summary judgment to the Board; we affirm.

Doe contends that her "1996-97 and 1997-98 placements were inconsistent with the IDEA's requirement that disabled

students be educated to the maximum extent appropriate in the regular classroom with non-disabled children." The administrative hearing officers, however, found that in both years the Board provided Jane Doe with the least restrictive appropriate placements under the IDEA. "Administrative findings in an IDEA case 'are entitled to be considered prima facie correct.'" *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1000-01 (4th Cir.), *cert. denied*, 522 U.S. 1046, 139 L. Ed. 2d 634, 118 S. Ct. 688 (1988) (quoting *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991)). In this case, as the district court found, "the evidence firmly supports both hearing officers' determination that the 'full inclusion' program promoted by the plaintiffs would not meet [Jane's] educational needs for core academic subjects, given her significant cognitive limitations and distractibility.

Perhaps recognizing this, Doe maintains that the district court erred in refusing to permit "meaningful discovery" or admission into evidence of certain documents. We review a district court's discovery rulings for abuse of discretion, and find no abuse here.

Doe also asserts that the district court erred in granting summary judgment on her § 504 and § 1983 claims. The § 504 claim was, as the district court held, both derivative of the IDEA claim (and so must fail because the IDEA claim fails) and waived (because Doe did not argue it in the state review hearing). The § 1983 claim was based entirely on the IDEA and § 504 claims. Since Doe cannot prevail on her IDEA and § 504 claims, she cannot prevail on her § 1983 claim. Moreover, notwithstanding Doe's assertions to the contrary, she has also failed to demonstrate that any statutory violation constituted a "policy or custom" of the Board, a prerequisite for § 1983 recovery against the Board. *See Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690-91, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).

We have fully considered all of Doe's remaining arguments. After careful review of the extensive record, the briefs and arguments of counsel, and the relevant legal authorities, we reject them and affirm the grant of summary judgment to the Board for the reasons stated by the district court. See *Jane Doe v. Arlington County Sch. Bd.*, 41 F. Supp. 2d 599 (E.D. Va. 1999).

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION No.: 98-0371-A

JANE DOE, *et al.*,

Plaintiffs,

v.

ARLINGTON COUNTY SCHOOL BOARD, *et al.*

Defendants.

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that defendants' motion for summary judgment is GRANTED, and this case is DISMISSED.

/s/ Claude M. Hilton
UNITED STATES
DISTRICT JUDGE

Alexandria, Virginia
March 18, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION No.: 98-0371-A

JANE DOE, *et al.*,

Plaintiffs,

v.

ARLINGTON COUNTY SCHOOL BOARD, *et al.*

Defendants.

MEMORANDUM OPINION

This case came before the Court on summary judgment motions filed by the parties. The Court has previously ruled that no facts are in dispute and this case should be decided on the administrative record.

Jane Doe was born on April 28, 1988, and is now 10 years old. During the 1996-97 and 1997-98 school years at issue, she attended Arlington Traditional School ("ATS"), for second and third grades, respectively.

She was first found eligible for special education while in kindergarten. She was in second grade during the time of the administrative proceedings.

For the years at issue, Jane Doe was identified as a disabled student on the basis of Mental Retardation. In addition, her attention deficit hyperactivity disorder ("ADHD") so significantly impacted her education that it was considered an additional disability.

The primary consequences of Jane Doe's disabilities are significant cognitive and adaptive behavior deficits that place

her far below the levels of her age and grade peers. Psychological evaluations have determined her full-scale IQ to be between 45 and 59, primarily within the moderately-mentally retarded range. Her level of adaptive functioning (in areas such as communication and daily living skills) is also far below her age and grade peers, and comparable to her cognitive deficits. As to academics, when she was nearly nine years old, her functioning in basic academic areas was more consistent with the functioning of a child of approximately 4½ to 5½ years of age.

The issue has always concerned the student's placement. The goals, objectives, and content of the student's Individualized Education Programs ("IEPs") have never seriously been in dispute. At the time of the March 1997 administrative hearing, Jane Doe received the majority of her academic instruction (reading, math, language, arts, etc.) in a special education "resource" classroom at ATS taught primarily by Lynn O'Grady. She attended a regular, second grade classroom, with her non-disabled peers, taught by Cynthia Margeson, for some academic instruction and morning routine. She would participate in music, lunch, physical education, recess, assemblies and field trips with her non-disabled second grade classmates. She also received speech/language therapy, and occupational therapy.

For the 1997-98 school year, she received core academic instruction in ATS' Cognitive Disabilities program, later renamed the "PACE" program. The PACE classroom was small, 4-5 students with cognitive profiles similar to that of the student, and was taught by a certified special education teacher with a Masters Degree. It provided intensive, direct instruction in Jane Doe's weakest academic areas. She also participated in a regular education third-grade class for all non-academic activities (which comprise over one-third of the week), as well as 30 minutes per week each in social

studies and science, with Rex Godwin, her regular education third-grade teacher.

At the initial March 11, 1997 administrative hearing, the parents elected not to introduce any live testimony, but rather to rely on the 200-plus documents that they had submitted. To expedite the proceedings, the parties agreed that the school system would present its witnesses' testimony by way of written statements from the student's teachers and other school staff.

Although several issues were decided, the hearing officer found that the school system's self-contained program for academic subjects, with mainstreaming for other subjects and activities, as recommended by Dr. Alvin Crawley and other school staff, would provide a least restrictive appropriate environment within which to implement the student's IEP. He also rejected the parents' allegations of discrimination, finding no evidence that ACPS officials discriminated against Jane Doe making it difficult for her to receive FAPE [free appropriate public education].

The parents appealed the hearing officer's decision to a reviewing officer, Arthur M. Baugh. In a June 9, 1997 hearing, the parents elected to call live witnesses (including teachers and school staff). They offered extensive testimony regarding the proposed program for the upcoming 1997-98 school year, under an updated April 9, 1997 IEP. After hearing the additional testimony, the reviewing officer affirmed all aspects of the hearing officer's decision. He specifically endorsed the appropriateness of the April 1997 IEP and proposed placement in the self-contained PACE classroom for academic instruction, and regular education instruction for all other subjects and activities. He ruled that when one considers both the facts and the law, it is clear that the student is receiving the least restrictive appropriate environment for implementation of Jane Doe's latest IEP (October 22, 1996). At the time of this review hearing there

was a new IEP, April 9, 1997, and the evidence at the June 9, 1997 hearing affirms that the IEP also is appropriate for the student for 97/98. In fact it was based on, and substantially unchanged from the IEP in which the parent's expert witness Dr. Sprouse participated and which the parents refer to as the "Sprouse IEP."

Both administrative decisions contained extensive findings of fact, which were fully supported by detailed references to specific exhibits and witness statements or testimony.

The plaintiffs in Count I seek to reverse the administrative decisions regarding the appropriateness of the proposed placements at issue. Plaintiffs contend, among other things, that the hearing officers improperly weighed the evidence, and wrongly concluded that the student was educated with her non-disabled peers to "the maximum extent appropriate" under IDEA. Plaintiffs further assert that the same alleged "denial of a free appropriate public education in the least restrictive environment" under IDEA amounts to "discrimination" prohibited by § 504, entitling them to money damages and a jury trial.

Plaintiffs in Count II seek reversal of the reviewing officer's decision on the specific ground that the reviewing officer somehow improperly approved the updated April 9, 1997 IEP formulated after the original hearing, but prior to the review hearing.

Count III seeks money damages under § 1983 for the alleged statutory violations in Count I.

In Count IV, the plaintiffs continue to claim that they were denied access to the student's educational records during the administrative proceedings.

This Court is required to give great deference to the findings of the administrative hearing officers. *Hartmann v. Loudoun County Bd., of Educ.*, 118 F.3d 996, 1000 (4th Cir.),

cert. denied, 118 S. Ct. 688 (1998); *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). Where, as here, the decisions of the Local and State Hearing Officers are in accord, "even greater deference is due." *Combs v. School Bd. of Rockingham County*, 15 F.3d 357, 361 (4th Cir. 1994).

Equally important in reviewing the record is that "[L]ocal educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment." *Hartman*, 118 F.3d at 1001; *see also Springer v. Fairfax County Sch. Bd*, 134 F.3d 659, 663 (4th Cir. 1998).

To "give meaning" to these principles, the Court must strictly limit the admission of any "additional evidence" beyond that contained in the Administrative Record. *Springer*, 134 F.3d at 666-67. To do otherwise would "reduce the proceedings before the state agency to a mere dress rehearsal by allowing appellants to transform the Act's judicial review mechanism into an unrestricted trial *de novo*." *Id.*, at 667.

It is also well settled in this Circuit that the plaintiffs here, as the parties "seeking to overturn a decision by a state hearing officer...properly bear the burden of proof in showing that the [administrative] decision was erroneous." *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 152 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991) (citing *Spielberg v. Henrico County Pub. Sch.*, 853 F.2d 256 n.2 (4th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989)). Plaintiffs' IDEA claim theorizes that the student's 1996-97 and 1997-98 placements were inconsistent with the IDEA's requirement that disabled students be educated "to the maximum extent appropriate" with non-disabled classmates. The hearing and reviewing officers both rejected this claim, and the record firmly supports their decisions.

The plaintiffs have agreed many times that the October 1996 IEP for the 1996-97 year, and the April 1997 IEP for the 1997-98 school year both contain appropriate goals, objectives and plans of instruction to enable the student to obtain educational benefits.

Therefore, the only issue is whether the student's placement during the 1996-97 and 1997-98 school years was the least restrictive appropriate placement for her under IDEA. *See* 20 U.S.C. § 1412 (5) (B) (Supp. 1996).

Throughout these proceedings, the plaintiffs have argued that education of a cognitively disabled student in anything other than a regular classroom setting for all subjects is illegal. However, the Fourth Circuit recently stressed in *Hartmann*, "the IDEA's mainstreaming provision establishes a presumption, not an inflexible mandate. Under its terms, disabled children are to be educated with children who are not handicapped only to the maximum extent appropriate. '. . . Section 1412(5) (B) explicitly states that mainstreaming is not appropriate when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.'" *Hartmann*, 118 F.3d at 1001 (emphasis added.)

The Supreme Court has recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children. *Rowley*, 458 U.S. at 181 n.4.

Thus, the "proper inquiry" in every mainstreaming case is "whether a proposed placement is appropriate under the Act." *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989); *Hartmann*, 118 F.3d at 1002 (Mainstreaming is "ultimately a goal subordinate to the requirement that disabled children receive educational benefit."). The Court in *Hartmann* reaffirmed the applicable criteria for evaluating mainstreaming cases.

Mainstreaming is not required where (1) the disabled child would not receive an educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in separate instructional setting; or (3) the disabled child is a disruptive force in a regular classroom setting. *Hartmann*, 118 F.3d at 1001. If the evidence supports any one of these factors, "mainstreaming" is not proper.

In *Hartman*, the school system had proposed a self-contained special education class for a nine-year old autistic student. Like the student's program here, the program in *Hartmann* included mainstreaming in regular education activities for lunch, art, music, library, physical education, and recess. The parents, however, like the parents here, demanded a "full inclusion" program in a regular third-grade class. The Fourth Circuit, according proper deference to the school system's judgments, affirmed the two administrative decisions finding the proposed program appropriate for the child. In upholding Fairfax County's decision not to place Michael DeVries in Annandale High School, the Court observed not only that Michael would derive virtually no academic benefit from the regular classroom, but also that his work would be at a much lower level than his classmates and that he would in effect "simply be monitoring classes." *DeVries*, 882 F.2d at 879. Here the hearing officer made an identical finding, concluding that Mark "did not participate in the regular curriculum, but was provided his own curriculum." Mark's special education teacher in Loudoun County explained, "Mark needs a completely different program . . . His skills have to be taught in a different way, in a different sequence, and even a different group of skills . . . from what his typical functioning peers are learning."

The evidence firmly supports both hearing officers' determination that the "full inclusion" program promoted by

the plaintiffs would not meet the student's educational needs for core academic subjects, given her significant cognitive limitations and distractibility. Their approval of the school system's self-contained special education program for the student's core academic instruction (math, language arts, writing, etc.), with participation in the regular classroom for all other courses and activities, is likewise amply supported by the record.

All of the school system educators who have participated in the student's IEP explained in detail why she cannot benefit from a regular class placement for her basic academics. As the hearing officers correctly noted, even several of the parents' private evaluators agreed. For example, Dr. Pearl, the neurologist retained by the parents, stated early on that he recommended that she receive a self-contained classroom setting for the academic subjects, and in particular for language arts and math. Likewise, the parents' private speech/language evaluator stated the student would benefit from a learning environment that has a small teacher student ratio.

Plaintiff was clearly unable to benefit from the regular education second and third-grade curriculum. Academically, she was many years behind her age and grade peers. While her regular education second-grade classmates were reading and writing about multi-chapter books, the student was still struggling to learn the sounds associated with letters, and to learn a few basic sight words. Likewise, in math, when other students were performing complex addition, subtraction, multiplication and division, she knew only the first few math facts, such as 1+1. When given the regular education class work, she would simply copy the second term in the equation as the answer. On the regular education writing assignments, many she could not even begin, while on others, she would similarly copy down random letters.

Accordingly, it was the uniform opinion of the school staff that the student needed different work, not modified regular assignments. The student's instructional needs dictate a curriculum which is fundamentally different both in pace and content, from the regular curriculum.

Additionally, her teachers found that providing the plaintiff with a modified or specialized curriculum in the regular education setting simply would not work, because she refused to perform work different from that of the regular education students.

Moreover, as the hearing and reviewing officers found, a regular education mainstream classroom of two-dozen students was too distracting for the student to learn, given her significant attentional deficits and distractibility. The student's distractibility in the large, regular education setting continued to present significant problems during the 1997-98 school year.

The placement proposed, and later implemented by the school system at ATS (the PACE program) gave the student the opportunity to learn her core academic subjects in a non-distracting environment, while receiving the intensive support of a trained special education teacher and aide, and a curriculum geared specifically for her level of disability.

As Dr. Crawley explained, for students like Jane Doe, "direct instruction, repetition, the drill, the pacing, all of those are essential in terms of making progress."

The student made substantial educational progress in her placement during the 1996-97 school year. Ms. O'Grady stated that it was the special education setting in which she observed the most progress for the student. At the hearing, she explained that she was previously a nonreader. "She couldn't identify alphabet letters. She can now give us most of the beginning sounds in words . . . . She at one point couldn't even match objects to a number, and now we've

moved pretty much beyond that, and the parents have worked a lot with her at home on homework to go along with what we're doing in school, where she can do simple addition. So this is a lot of progress for the student."

Even the student's mother agreed that she made progress while working with Ms. O'Grady.

For the 1997-98 school year, Dr. Crawley explained that the PACE classroom offered even more advantages than the special education instruction she received during the 1996-97 school year, given its specific focus on students with disabilities like Jane Doe's, and the elimination of the distraction posed by instruction in different rooms with different teachers.

The most compelling proof of whether an educational program was appropriate is whether the student, indeed, made progress in that program. Here, everyone, including the parents themselves, agree that the student did make tangible educational progress while receiving core academic instruction in the PACE classroom for the 1997-98 school year. The student also benefitted from the time she spent with her non-disabled peers in music, art, recess, assemblies, and other activities.

The parents' repeated contention that the school system could have appropriately educated the student in the regular classroom for all subjects by providing her with a personal aide or special education teacher to assist her in class, is simply unsupported. The hearing and reviewing officers both rejected that contention. The school staff fully considered the parents' idea, but explained in great detail why it would not work. As Ms. O'Grady testified:

"special ed teacher could take that IEP and go in that classroom . . . . That would mean that Jane Doe would work in a group of one with the special ed teacher, I assume over on another table, and my concern is twofold. The student's

distractibility and her attention deficit. She would hear two adults talking at the same time. She'd be looking at what the other kids were doing, and I believe she would have difficulty focusing on what she was asked to do. My other concern about the core areas is the need of very direct instruction, and my opinion is that in language arts and math, those very important areas, she needs to be taught. She doesn't need to be in the regular classroom drawing a picture of George Washington while the other kids are reading and writing questions that go along with it."

Her regular education teacher echoed these concerns. She explained that an aide cannot eliminate the activity and distraction which results from having 22 other students in a class. The aide also can neither do the learning for her nor bridge the gap in cognitive levels between the student and the other students in the class.

Given the evidence, and the professional judgment of school staff, that providing core academic instruction in the regular classroom would not be appropriate for Jane Doe, the school system was not obliged to reject an effective plan, and experiment with an ill-advised "full inclusion" plan, as the plaintiffs seem to theorize.

The plaintiffs' additional contention that the school system has "failed and refused to provide in the regular classrooms the supplemental services and modifications to which Jane Doe is entitled by law" is also untrue. In fact, the student's teachers attempted every manner of adaptations and accommodations to try to provide modified academic instruction in the regular education environment, but they were not successful. The unsuccessful attempts to provide modified course work for the student in the regular education class have been described in detail. Ms. Mageson also attempted a wide variety of other adaptations and accommodations in the regular classroom. She provided more individual assistance to the plaintiff than to any other

student in her class, and more time outside of class to addressing issues for her than for any other student. The IDEA "does not require regular education instructors to devote all or most of their time to one handicapped child . . ." *Daniel R,R, v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989); *D.F.v. Western Sch. Corp,* 921 F. Supp. 559, 571 n.3 (S.D. Ind. 1996).

As discussed above, the school staff provided knowledgeable and detailed explanation of precisely why the "full inclusion" program advocated by the parents was not appropriate for the student, and why a self-contained special education setting for academic classes was necessary. By contrast, the parents' original educational consultant, Dr. Sprouse, relied primarily upon general theories and philosophies. She could not identify the concrete details of how a "full inclusion" program would work, such as whether or when the student would be assisted in the regular class by a special education teacher, a parent volunteer, or someone else. The parents' newfound experts, Dr. Bruns and Ms. Giles, similarly lacked any concrete details.

In Sum, the evidence firmly supports the hearing officers' findings that the "full inclusion" program advocated by the parents was not appropriate. The well-informed testimony of the school staff solidly established that the self-contained placement for academics met the applicable "mainstreaming" criteria under the *Hartmann* standard: The student either could "not receive an educational benefit from mainstreaming into a regular class" for her core academics, or "any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting." 118 F.3d at 1001.

The plaintiffs attempt to raise two new matters that were not raised before the hearing officers below.

The first is an argument that the school system somehow violated the IDEA's "stay put" requirement (20 U.S.C. 1415(e) (3) [now §1415(j)]), by not providing all of the student's instruction in a "mainstream" environment as supposedly required by a June 1996. The second argument is that two memos written in 1993 by several former school administrators (who were never involved in Jane Doe's specific placement decisions) discussing general concerns at that time, somehow show that Jane Doe's placement three to five years later was inappropriate.

Because this "stay put" argument was never raised in the administrative hearings, plaintiffs are precluded from raising it now. *See, e.g., Leonard v. McKenzie*, 869 F. 2d 1558, 1563 (D.C. Cir. 1989) ("'Courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objections made at the time appropriate under its practice'") (citation omitted); *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 424 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986) ("for issues to be preserved for judicial review they must be presented to the administrative hearing officer."); *Bruschini v. Board of Educ. of the Arlington Cent. Sch. Dist.*, 911 F. Supp. 104, 107-08 (S.D.N.Y. 1995) (same).

In any event, the school staff involved in that IEP explained that it was all parties' understanding that the June, 1996 IEP was not intended to be a "full inclusion" IEP, but rather, was to offer flexibility in the amount of time that the student could spend in either a special education or regular education classroom. It is also inconceivable that the parents could really believe that the June, 1996 IEP was a "full inclusion" IEP, given their admission that the student's educational program prior to that IEP provided special education instruction outside of the regular classroom.

As to the second issue, the 1993 memos was an issue not raised below. The memos written years before the time

periods at issue reveal that they say nothing about the student, as even the plaintiffs admit. Plainly, they are not relevant here. Plaintiffs have no facts to suggest that these general memos were connected to placement decisions about Jane Doe three, four and five years later. Moreover, to the extent that it was necessary to consider the issue further, the authors themselves explained in detail that these memos were merely opinions advocating even greater improvements within the school system.

Plaintiffs' § 504 claim is derivative of their IDEA claim. In ¶27 of the complaint, they allege that the student has been "discriminated" against because she has allegedly been "denied the benefits of a free appropriate public education in the least restrictive environment solely by reason of handicap of plaintiff Jane Doe." The gist of the claim is precisely the same as plaintiff's IDEA claim that the student was supposedly denied an appropriate education.

The law is clear that to the extent plaintiffs want to assert such claims under § 504, they must first exhaust all administrative procedures under IDEA. *See* 20 U.S.C. § 20 U.S.C. § 1415(f), *Charlie F. v. Board of Educ. of Skokie Sch Dist. 68*, 98 F.3d 989, 991 (7th Cir. 1991) (exhaustion required on § 504 claim, even though money damages not available under IDEA); *Waterman v. Marquette-Alge Intermediate Sch. Dist*, 739 F.Supp. 361, 365 (W.D. Mich. 1990) (same). As with IDEA claims, the exhaustion rule also bars consideration of claims under § 504 not raised below. *E.g., Howell v. Waterford Pub. Sch*, 731 F.Supp. 1314, 1316 (E.D. Mich. 1990) (dismissing § 504 claims as waived, and stating that "only allegations of plaintiffs' amended complaint which have been administratively exhausted" may be pursued) (emphasis in original); *Ciresoli v. Maine Sch. Admin. Dist., No. 22.*, 901 F.Supp. 378, 387 (D. Me. 1995) (barring special education related claims under § 504 and

ADA which were not presented in the administrative hearings below).

An issue raised in the initial due process hearing, but not argued and briefed on appeal, is deemed waived. *Moubry v. Independent Sch. Dist. 696*, 9 F.Supp. 2d 1086, 1099 (D. Minn.1998) (dismissing claim not argued in review proceedings, and observing that a number of courts have refused consideration of "challenges to an HO's [Hearing Officer's] decision on an issue, when that challenge was not presented, on appeal, to the appropriate HRO [Hearing Review Officer].") (citing cases). This is precisely what occurred with the parents' § 504 "discrimination" claim here.

Plaintiffs raised a discrimination" issue in the initial administrative hearing. The hearing officer rejected it as without any evidence support. On appeal, however, the parents did not raise the issue. The statement of issues submitted by plaintiffs' counsel on appeal did not mention the § 504 "discrimination" claim at all. Neither did his follow-up fax identifying another issue. Still further, after the review hearing, the plaintiffs' 28-page brief does not argue the "discrimination" issue now urged in plaintiffs' lawsuit. Having failed to preserve this "discrimination" claim below, the plaintiffs here, like those *in Moubry*, are not permitted to resuscitate it in this Court now.

Even if the § 504 claim had not been waived, because it is based upon the allegation that the student was deprived of a free appropriate education, dismissal of the IDEA claim would require dismissal of the parallel § 504 claim as well. It is well-settled that in such cases, where the IDEA claims are subject to dismissal the § 504 claims based upon the same allegations, must also be dismissed. *E.g., Jones v, Washington County Bd. of Educ.*, 15 F.Supp. 2d 783, 787 (D. Md. 1998) ("because [plaintiffs'] IDEA claim failed, their Rehabilitation Act claim also fails"); *D.F.*, 921 F.Supp. at 573-74 (Dismissal of IDEA claim necessarily required

dismissal of § 504 claim that student was "unlawfully excluded from the general education program at his neighborhood school."); *Moubry*, 9 F.Supp. 2d at 1112; *Monticello Sch. Dist. No. 25 v. Illinois State Bd. of Educ.,910 F.Supp. 446, 449-50 (C.D.Ill. 1995). aff'd*, 102 F. 3d 895 (7th Cir. 1996); *see also Independent Sch, Dist, No. 283 v. S.D.*, 88 F.3d 556, 562 (8th Cir. 1996) (summary judgment on IDEA claims bars § 504 and other statutory claims based upon alleged inappropriate educational program).

In the special education context, the standard of proving a §504 claim is extraordinarily high. The plaintiffs must first demonstrate that "they have either been 'subjected to discrimination' or excluded from a program or denied benefits 'solely by reason of their disability." *Sellers v. School Bd. of the City of Manassas*, 141 F.3d 524, 528 (4th Cir.), *cert. denied*, 119 S. Ct. 168 (1998). Thus, if the alleged discrimination was motivated by factors other than the disability, even if the disability was, in part, a motivating factor, no claim under § 504 lies. *E.g., Johnson v. Thompson*, 971 F.2d 1487, 1493 (10th Cir. 1992), *cert. denied*, 507 U.S. 910 (1993) ("The word solely provides the key: the discrimination must result from the handicap and the handicap alone.").

Second, they must establish that the School Board's educational decisions relating to the student were so inappropriate *as to constitute "either bad faith or gross misjudgment." Sellers* 141 F.3d at 529. This follows from this Court's prior holding that "§504 does not create any general tort of educational malpractice." *Barnett v. Fairfax County Sch. Bd.*,721 F.Supp. 755, 757 (E.D. Va. 1989), *aff'd*, 927 F.2d 146 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991).

The "bad faith or gross misjudgment" standard is extremely difficult to meet, especially given the great deference to which local school officials' educational judgments are entitled. Something far more than a mere

denial of free appropriate education is required. Thus, in dismissing the plaintiffs' § 504 claim, the Fourth Circuit, in *Sellers*, followed the Eighth Circuit's decision in *Monahan v. Nebraska*, 687 F.2d 1164 (8th Cir. 1982), *cert. de*nied, 460 U.S. 1012 (1983) holding that: The reference in the Rehabilitation Act to "discrimination" must require, we think, something more than an incorrect evaluation, or a substantively faulty individualized education plan, in order for liability to exist. Experts often disagree on what the special needs of a handicapped child are, and the educational placement of such children is often necessarily an arguable matter. That a court may, after hearing evidence and argument, come to the conclusion that an incorrect evaluation has been made, and that a different placement must be required under [IDEA], is not necessarily the same thing as a holding that a handicapped child has been discriminated against solely by reason of his or her handicap. 141 F.3d at 529 (quoting *Monahan*, 687 F.2d at 1170). Likewise, in *Moubry*, the Court dismissed the plaintiffs' § 504 claim, and observed, in language equally applicable here: "No amount of claimed violation of the Federal regulations will relieve the plaintiff from his burden to show bad faith or gross misjudgment. Upon a review of the administrative findings in their totality, it would be legally untenable to conclude that, in providing for the plaintiff's education, in a manner that fully complies with the IDEA, the district officials nevertheless, acted in bad faith, or with gross misjudgment, without wholly vitiating the results of our Judgment on the Record." *Moubry*, 9 F.Supp. 2d at 1111. The Court in *Monahan* further explained that, so long as the educational officials "have exercised professional judgment, in such a way as not to depart grossly from accepted standards among educational professionals, we cannot believe that Congress intended to create liability under § 504." 687 F.2d at 1171.

There is no evidence of bad faith or gross misjudgment in this case. Not only did the hearing officers affirm the school

system's placement decision, but they also found a complete absence of any evidence of improper "discrimination" against the student. The hearing officer even cited to substantial evidence of "nondiscriminatory bent" on the part of school officials. Perhaps most telling of all, even the plaintiffs' own paid educational experts in this case both conceded that the school system's actions in no way rose to the level of "bad faith or gross misjudgment."

The plaintiffs also lack any evidence that the School Board acted "intentionally" to discriminate against the student. *E.g.*, *Marvin H. v. Austin Indep. Sch. Dist.*, 714 F.2d 1348, 1357 (5th Cir. 1983); *Sellers*, 960 F.Supp. at 1006, 1010, (E.D. Va. 1997), aff'd, 141 F.3d 524 (4th Cir). *cert. denied* 119 S.Ct. 168 (1998). Rather, even the student's mother concedes that no school system member "intentionally" tried to do harm to Jane Doe: "I don't believe that they set out to cause her physical, emotional or educational harm."

The record is devoid of any evidence of "bad faith or gross misjudgment." The § 504 claim must be dismissed.

Count II simply alleges that the reviewing officer should be reversed because he supposedly had no authority to address the April 1997 IEP, as that IEP was not in existence at the time of the initial hearing decision from Judge Maxson. This contention is without merit. The applicable special education regulations clearly state that during any review hearing, the reviewing officer has the right to accept and hear "additional evidence, if necessary. If a hearing is held to receive additional evidence, then all hearing rights as specified in this section apply." 8 Va. Admin. Code § 20-80-70(A) (11) (a) (3). Even under the Fourth Circuit's strict interpretation of "additional evidence" under IDEA, "additional evidence" includes relevant, "supplemental" information. *Springer*, 134 F.3d at 667. The State Review Officer, thus, clearly had discretion to consider supplemental matters such as the April

9, 1997 IEP that had been formulated after the conclusion of the prior "due process" hearing.

Moreover, in this case, at the June 9, 1997 review hearing, the plaintiffs themselves requested the right to submit additional evidence, and live testimony after having elected to present none in the prior hearing. The April 9, 1997 IEP was presented and accepted as an exhibit at the hearing before State Review Officer Baugh, without any objection by the parents, or their counsel. Parents' counsel even agreed with the State Review Officer's clarification that the earlier, October 22, 1996 IEP was not longer at issue, in light of the more recent April 9, 1997 IEP. Having agreed that the April 9, 1997 IEP was properly under consideration by the reviewing officer, the plaintiffs cannot now contend that it was error for the hearing officer to consider that IEP. In any event, consideration of the April 1997 IEP (as opposed to the October 1996 IEP) made no substantive difference, as both plaintiffs' counsel and the expert witness, agreed that the two IEPs are "basically the same".

The plaintiffs' § 1983 claim also fails because they cannot establish that any of the alleged deprivations they claim were pursuant to an official "policy or custom" of the School Board. *See Monell v. Department of Soc. Servs.* 436 U.S. 658, 690-91, 694 (1978); *Brubaker v. City of Richmond*, 943 F.2d 1363, 1379 (4th Cir. 1991).

The plaintiffs have no proof that the alleged denial of an appropriate education for the student resulted from an official "policy or custom" of the School Board. Indeed, the evidence shows the School Board's policy is to adhere completely to "least restrictive environment" provisions of the IDEA, and the reviewing officer so found.

The plaintiffs claim that they were somehow denied access to the student's educational records." Both hearing officers rejected these claims. The hearing officer devoted nearly

five, single-spaced pages to explaining the parents' contentions in this regard. The reviewing officer found that the "evidence in this case is abundantly clear that the appellants have been able to review all of the records.

The complaint seems to take issue with the fact that the plaintiffs were not permitted to photocopy certain copyrighted test protocols contained in the student's "confidential" file. The reviewing officer correctly found that, "copyright restrictions preclude them from being copied and given to the [parents]." At the hearing, the protocols were made available for the plaintiffs' review, but they never bothered to look at them. Because these documents were made available, the plaintiffs' attorney conceded that the issue "was moot." In fact, he stated on the record that the parents' claim about non-access to records was "all speculation," and that "there's not going to be any proof on it." The same documents were again made available at the review hearing, at which time they were reviewed by Mrs. Doe. Plaintiffs cannot seriously claim denial of access to records.

For the foregoing reasons, summary judgment should be GRANTED in favor of the defendants.

/s/ Claude M. Hilton

CHIEF UNITED STATES
DISTRICT JUDGE

Alexandria, Virginia March 18, 1999
March 18, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JANE DOE, a minor by her parents and next friends, and DOE, Parent of JANE DOE, and JUNE DOE, Parent of JANE DOE,

Plaintiffs,

v.

ARLINGTON CO. SCHOOL BOARD,

Defendant.

ORDER

This matter comes before the Court on Plaintiffs' Objection to Order Denying Plaintiffs' Motion to Compel Compliance with Rule 30 (b)(6), Plaintiffs' Motion to Stay Proceedings until this matter is resolved, Plaintiffs' Motion to Strike Defendant's Reply Brief Exhibits, and Defendant's Motion *in limine* to Exclude Certain Witnesses and Documentary Evidence. The Plaintiffs appeal the Magistrate Judge's Order Denying Plaintiffs' Motion to Compel Compliance with Rule 30(b)(6), entered on December 18, 1998. The Court finds that the Magistrate Judge's Order is neither clearly erroneous nor contrary to law and should be affirmed. Considering Defendant's Motion for Summary Judgment, the Court finds that there are no issues of material fact in dispute and this case is ripe for summary judgment. While Plaintiffs seek to present additional evidence, the Court that what Plaintiffs seek to produce is not additional evidence to amplify or clarify the evidence in the administrative record. Rather, Plaintiffs seek to present evidence available at the time of the administrative hearings, but which they chose not to present at that time.

Matters which were not raised in the state administrative hearings are precluded from being raised in this Court. *See Leonard v. McKenzie*, 869 F.2d 1558, 1563 (D.C. Cir. 1989); *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411,424 (lst Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986). While additional evidence may be presented, the admission of the additional evidence contemplated by 20 U.S.C. § 1415(e)(2) should not be allowed when it would "reduce the proceedings before the state agency to a mere dress rehearsal by allowing appellants to transform the Act's judicial review mechanism into an unrestricted trial de novo." *Fairfax County Sch Bd.*, 134 F.3d 659, 663 (4th Cir. 1998) (quoting *Roland M. v. Concord School Comm.*, 910 F.2d 983,997 (lst Cir. 1990), *cert. denied*, 499 U.S. 912, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991). Therefore, any evidence which could have been, but was not, presented to the state hearing officers shall not be considered by this Court. Therefore, it is hereby,

ORDERED that the Magistrate Judge's Order of December 18, 1998 is AFFIRMED, Plaintiffs' Motion to Stay Proceedings is MOOT, this case is removed from the trial docket on January 19, 1999, and on January 19, 1999 at 10:00 a.m. the Court will hear oral argument on summary judgment. Each side may have 30 minutes to argue and each side may supplement their briefs, but must do so on or before January 15, 1999.

/s/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
January 8, 1999

ARLINGTON PUBLIC SCHOOLS
Office of Student Services
Special Education Department

November 2, 1993

To: Arthur W. Gosling, Superintendent

From: Sharon Ferguson, Director, Student Services
Ellen Kahan, Deputy Director, Special Education

Subject: Special Education Programs

The Special Education Department has developed the attached paper outlining concerns on the current status of special education in Arlington Schools. Recent trends and litigation on questions of least restrictive environment and special education placements have forced us to carefully review current practices in Arlington. We are very concerned about the large numbers of students in self-contained programs in Arlington, the limited opportunities at isolated schools for students to be included with the regular peers and the rising pressure from parents to develop a philosophy of greater inclusion for students. We believe that current Arlington practices are inconsistent with nationwide trends and recent court decisions. The attached document presents the major issues and concerns and recommendations for change. We look forward to discussing this further with you.

Attachment.

EHKjmm

ARLINGTON PUBLIC SCHOOLS
OFFICE OF THE SUPERINTENDENT

MEMORANDUM November 17, 1993

To: Members of the Administrative Staff

From: Arthur W. Gosling

Subject: Special Education: Future Directions

During the last several months leadership staff for special education has been reviewing both professional and legal trends in the field. Special education programs in the Arlington County Schools have been considered in relationship to them. It is clear that our practices are inconsistent with these nationwide trends as well as recent court decisions.

It is time for the Arlington County Schools to assert its commitment to excellent to all students, including those receiving special education services. We must demonstrate our willingness to respond constructively to the challenges before us by facing up to the need to reorient our attitudes about special education program delivery services. Self-contained classrooms and services as cornerstone programs of our delivery strategies no longer are acceptable.

Strong and constructive leadership from all administrative staff will be crucial as we address this important challenge. Unless we commit to a philosophy of inclusion rather than accept traditional isolation practices, we cannot expect our teachers and parents to be accepting of our inclusion concept. Leadership matters, and I am calling upon each of us to begin the process of thinking through how we can lead others through this important attitude change as a necessary precursor to program delivery change. I recognize that substantial staff development will be needed before we can implement new instructional strategies. Attached is a concept

paper from Sharon Ferguson and Ellen Kahan. They provide background information and identify the challenges before us. Please read the paper. Your comments directed to Dr. Ferguson, Dr. Kahan, or to me, are invited and welcomed. During the coming months, they will be developing a long range plan to help us implement a modern and appropriate educational program for our special education students.

In addition to my requesting that you read the attached paper, I am asking that you give serious thought to programs under your direction or supervision. How can you begin to lay the groundwork for moving toward an inclusion delivery model within your area of responsibility?

Attachment.

ARLINGTON PUBLIC SCHOOLS
Department of Student Services
Office of Special Education

June 3, 1994

MEMORANDUM

To:

From: SHARON FERGUSON, Director, Student Services
ELLEN KAHAN, Deputy Director, Special Education

Subject: Five Year Plan for the Integration of Special Education Students

Please find attached for your review, a copy of the draft of a five year plan to increase and equalize opportunities for special education students to be more fully integrated into regular education. While Arlington Schools will always maintain a full continuum of services for special education students, careful examination of the large numbers of students being served in restrictive environments requires change. There are also significant differences in special education services, to students with similar needs, from one school to another. The issues of opportunity and consistency of opportunity both important to improving special education in Arlington.

For the past several months, staff from the Office of Special Education have met with administrative groups, school staffs, and parent groups to discuss the integration of special education students. This has provided a valuable perspective on the complex issues to be addressed in this change process.

The five year plan reflects the thinking and ideas of many people. To add to that perspective, it would be most helpful if you and members of your group would carefully review the

plan. Your suggestions for revisions or additions to the plan would be most appreciated. Please forward your suggestions to Ellen Kahan either in summary form or by writing directly on the draft plan. It would be appreciated if your response could be returned by August l, 1994.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JUL 20 2000
CLERK

No. 99-2028

IN THE

Supreme Court of the United States

JANE DOE, a minor, by her parents and next friends, JOHN DOE and JUNE DOE, parents,

Petitioners,

v.

ARLINGTON COUNTY SCHOOL BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

ARA L. TRAMBLIAN
Acting County Attorney
CAROL W. MCCOSKRIE
Assistant County Attorney
#1 Courthouse Plaza
Suite 403
2100 Clarendon Blvd.
Arlington, Virginia 22201
(703) 228-3100

THOMAS J. CAWLEY
Counsel of Record
JOHN F. CAFFERKY
ARTHUR E. SCHMALZ
KATHRYN A. GILES
HUNTON & WILLIAMS
1751 Pinnacle Drive
Suite 1700
McLean, Virginia 22102
(703) 714-7400

Attorneys for Respondent

161036

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

47 pp

QUESTIONS PRESENTED

The Respondent objects to the Questions Presented as stated by the Petitioners in that they are argumentative in violation of Supreme Court Rule 14(1)(a). Accordingly, the Respondents submit that the Petitioners' questions should be read as follows:

1. Whether this Court should grant Certiorari to review the allocation of the burden of proof in cases brought under the *Individuals with Disabilities Education Act* ("IDEA"), 20 U.S.C. § 1400 *et seq.*, where the Petitioners did not raise the issue below, the administrative and District Court decisions did not depend upon allocation of the burden of proof, and the burden was properly on the Petitioners, as the party challenging the Individualized Education Plan ("IEP") and the agency determination.

2. Whether in reviewing the decisions of an administrative Hearing Officer and Reviewing Officer under IDEA, the District Court abused its discretion in denying the Petitioners' request to admit additional evidence, where that evidence was available at the time of the administrative proceedings, and did not pertain to the student's individual placement.

3. Whether the District Court and Court of Appeals properly held that the Petitioners had waived their claim that the School System's special education program discriminated against the Student in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, where that claim was raised, but later abandoned, during the administrative proceedings.

4. Whether Petitioners were entitled to a jury trial on their Section 504 and Section 1983 claims, where the evidence did not create an issue of material fact as to the existence of bad faith and gross misjudgment, or a school board policy, and where IDEA requires review of special education placements by the Court.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Cited Authorities	vi
Opinions Below	1
Statutory Provisions	1
Statement of the Case	1
Statement of Facts	4
A. The Student.	4
B. Jane's Educational Program.	6
C. Facts Established in the Administrative Proceedings.	7
D. The District Court's Affirmance of the Hearing Officers' Decisions, and Dismissal of Statutory Claims on Summary Judgment.	8

Contents

	Page
Reasons for Denying the Writ	10
I. The Administrative And District Court Decisions Did Not Depend Upon Allocation Of The Burden Of Proof, The Parents Did Not Raise The Issue Below, And The Burden Was Properly Placed On Parents — As The Party Challenging The IEP — In Any Event.	10
A. Petitioners Did Not Raise the Issue Below.	10
B. The Administrative and District Court Decisions Do Not Depend Upon Allocation of the Burden of Proof.	11
C. The Administrative Hearing Officer, and the District Court, Correctly Assigned the Burden of Proof to the Parents. ...	12
II. The Courts Below Correctly Exercised Judicial Discretion Consistent With IDEA And Other Circuits In Determining What Evidence Could Be Introduced At The District Court Level.	15
III. The District Court And Court Of Appeals Correctly Dismissed The Petitioners' Section 504 And Section 1983 Claims.	22

Contents

Page

A. The District and Appellate Courts Properly held that Petitioners Were Required to Exhaust Their Administrative Remedies Prior to Bringing Their Section 504 Claim. 22

B. Petitioners were Not Entitled to a Jury Trial on their Discrimination Claims Since They Failed to Provide Any Evidence that the School System Exercised Bad Faith and Gross Misjudgment. 25

C. The Statutory Framework Provides for Review of Special Education Placement by the Court, Not a Jury. 28

Conclusion 30

Appendix — Statutory Provisions 1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986) 13

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 26

Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442 (1977) 28

Barnett v. Fairfax County School Board, 927 F.2d 146 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991) 13

Beacham v. Lee-Norse, 714 F.2d 1010 (10th Cir. 1983) 21

Board of Education v. Rowley, 458 U.S. 176 (1982) 12, 13, 14, 16, 28, 29

Bristow v. Drake Street, Inc., 41 F.3d 345 (7th Cir. 1994) 11

Brubaker v. City of Richmond, 943 F.2d 1363 (4th Cir. 1991) 28

Charlie F. v. Board of Educ., 98 F.3d 989 (7th Cir. 1996) 23, 24

Cited Authorities

Page

Christopher W. v. Portsmouth Sch. Comm., 877 F.2d 1089 (1st Cir. 1989) 23, 24

Clyde K. v. Puyallup Sch. Dist., No. 3, 35 F.3d 1396 (9th Cir. 1994) 14, 15

Doe v. Bd. of Educ., 9 F.3d 455 (6th Cir, 1993), *cert. denied*, 511 U.S. 1108 (1994) 14

E.S. v. Independent Sch. Dist., No. 196, 135 F.3d 566 (8th Cir. 1998) 14, 18

Federal Trade Comm'n v. Grolier, Inc., 462 U.S. 19 (1983) 10

Fidelity & Deposit Co. v. United States, 187 U.S. 315 (1902) 26

Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031 (3d Cir. 1993) 14

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 29

Heather S. v. Wisconsin, 125 F.3d 1045 (7th Cir. 1997) 14

Hope v. Cortines, 69 F.3d 687 (2nd Cir. 1995) 23

Cited Authorities

Page

Johnson v. Independent School Dist. No. 4, 921 F.2d 1022 (10th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991) 13, 14

Jones v. Washington County Bd. of Education, 15 F. Supp. 2d 783 (D. Md. 1998) 27

Kerkam v. McKenzie, 862 F.2d 884 (D.C. Cir. 1988) 14

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) 19

Leonard v. McKenzie, 869 F.2d 1558 (D.C. Cir. 1989) 10

Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990) 29

Marvin H. v. Austin Indep. Sch. Dist., 714 F.2d 1348 (5th Cir. 1983) 27

Metropolitan Gov't of Nashville v. Cook, 915 F.2d 232 (6th Cir. 1990) 18

Monell v. Department of Soc. Servs., 436 U.S. 658 (1978) 28

Montana Dep't. of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) 10

Cited Authorities

Page

Monticello Sch. Dist. No. 25 v. George L., 102 F.3d 895 (7th Cir. 1996) 17

Moubry v. Independent Sch. Dist. 696, 9 F. Supp. 2d 1086 (D. Minn. 1998) 29

Murray v. Montrose County Sch. Dist., 51 F.3d 921 (10th Cir.), *cert. denied*, 516 U.S. 909 (1995) ... 18

Muth v. United States, 1 F.3d 246 (4th Cir. 1993) ... 10

N.B. v. Alachua County School Bd., 84 F.3d 1376 (11th Cir. 1996), *cert. denied*, 519 U.S. 1092 (1997) 23, 24

Oberti v. Board of Educ., 995 F.2d 1204 (3d Cir. 1993) 14, 15

Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467 (9th Cir. 1993), *cert. denied*, 513 U.S. 825 (1994) .. 17

Roland M. v. Concord Sch. Comm. 910 F.2d 983 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1991) 14, 16

Salley v. St. Tammany Parish Sch. Board, 57 F.3d 458 (5th Cir. 1995) 13, 14

San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) 12

Cited Authorities

Page

Sellers v. School Bd., 960 F. Supp. 1006 (E.D. Va. 1997), *aff'd*, 141 F.3d 524 (4th Cir.), *cert. denied*, 525 U.S. 871 (1998) 26, 27

Sims v. Apfel, 120 S. Ct. 2080 (2000) 23

Spielberg v. Henrico County Public Schools, 853 F.2d 256 (4th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989) 13

Springer v. Fairfax County Sch. Bd., 134 F.3d 659 (4th Cir. 1998) 16, 18

Susan N. v. Wilson Sch. Dist., 70 F.3d 751 (3d Cir. 1995) 17

Town of Burlington v. Department of Educ., 736 F.2d 773 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985) 17, 18, 19

Walker County Sch. Dist. v. Bennett, 203 F.3d 1293 (11th Cir. 2000) 18

Weber v. Cranston Sch. Comm., 212 F.3d 41 (1st Cir. 2000) 23

Witte v. Clark County School District, 197 F.3d 1271 (9th Cir. 1999) 24

Cited Authorities

Page

Statutes:

20 U.S.C. § 1400 *et seq.* ..... i, 2

20 U.S.C. § 1415(b) 1

20 U.S.C. § 1415(b)(2) 15, 23

20 U.S.C. § 1415(c) 1, 23

20 U.S.C. § 1415(d) 1

20 U.S.C. § 1415(e)(1) 1

20 U.S.C. § 1415(e)(2) 1, 9, 16, 17, 28

20 U.S.C. § 1415(f) 1, 23

29 U.S.C. § 794 ..... i, ii, 3, 9, 22, 23, 24, 25, 27, 29

42 U.S.C. § 1983 ..... ii, 3, 9, 22, 27, 29

United States Constitution:

Seventh Amendment 28

Rules:

Fed. R. Evid. 402 21

United States Supreme Court Rule 14(1)(a) i

Other Authority:

8 VAC 20-80-70(A)(10) & (11) 15

The Arlington County School Board (the "School System"), files this Brief in Opposition to the Petition for Writ of Certiorari to respond to the arguments raised by the Petitioners, Jane Doe ("Jane" or "Student"), and her parents, John and June Doe.

OPINIONS BELOW

Prior to the Court of Appeals and District Court opinions in this case,[1] a Hearing Officer and a State-Level Reviewing Officer entered administrative decisions in favor of the School Board. These administrative decisions are not reported, and were not included in the Appendix to the Petition, but are part of the Joint Appendix filed with the United States Court of Appeals for the Fourth Circuit (JA 995 and JA 1203).

STATUTORY PROVISIONS

Individuals with Disabilities Education Act, 20 U.S.C. §§ 1415(b), (c), (d), (e)(1), (e)(2), and (f) (1996) (set out in Appendix to this Brief).[2]

STATEMENT OF THE CASE

This case concerned the appropriate special education program for Jane Doe, an individual elementary school student with mental retardation and attention deficit hyperactivity disorder, during the 1996-97 and 1997-98 school years.[3] For Jane's specific needs, the School System offered, and provided, a program which combined a small, structured special education

---

1. Citations in this Brief to the opinions of the Court of Appeals and the District Court are to the Appendix to the Petition for Writ of Certiorari (Pet. App.).

2. Although Petitioners cite in their Petition for Certiorari to the provisions of IDEA as amended in June, 1997, the school system cites herein to the provisions of IDEA as they existed at the time the relevant IEPs in this case were prepared.

3. By stipulation, the parties agreed that the educational placement of Jane Doe for the then-current 1998-99 school year would not be considered in this proceeding. That placement was the subject of separate administrative proceedings initiated by the Petitioners (JA 181).

class for core academic instruction (reading, writing, and math), together with participation in a regular education class for all other activities (including music, art, physical education, lunch, recess, special activities, and some "hands-on" science and social studies lessons). Petitioners sought to have Jane placed in a regular-education class for the entire school day — a class where the level of the work was approximately five years above Jane's level of functioning.

In two rounds of extensive administrative hearings, an independent Hearing Officer, and an independent Reviewing Officer, each concluded that the School System had made available a special education program for Jane Doe in the least restrictive appropriate environment, fulfilling all requirements of the *Individuals with Disabilities Education Act* ("IDEA"), 20 U.S.C. § 1400 *et seq*. The administrative Hearing and Reviewing Officers further found that the placement requested by the Petitioners would not be appropriate for Jane.

The Petitioners then filed an action in United States District Court, again seeking to overturn the administrative decisions. Reviewing those decisions, the Administrative Record, and admissions concerning Jane's progress since the hearings, the District Court, in a comprehensive opinion, affirmed the administrative decisions. In a further appeal by the Petitioners, the United States Court of Appeals for the Fourth Circuit again considered all of the Petitioners' arguments, and again reviewed the administrative record. That Court likewise affirmed the administrative decisions finding that the School System's proposed placement was appropriate for Jane, and that the Petitioners' proposed "full inclusion" placement was not.

The Petitioners' primary complaint is that despite Jane's significantly below average cognitive and educational functioning, and substantial attention deficits, she should receive *all* her core academic instruction in a regular education classroom, and absolutely none in a special education class. Having had their claims rejected by four separate tribunals —

whose decisions are entitled to deference — Petitioners now ask this Court to substitute its judgment for that of those fact-finders, and the well-supported opinions of the teachers and educators upon whom the fact finders relied. The Court should reject this invitation.

In the District Court, Petitioners attempted to reinvent their position in the administrative proceedings by proffering "additional evidence," consisting of information which they could have presented, but failed to present, during the administrative hearings, and which was, in any event, irrelevant to Jane Doe's specific placement. The District Court properly exercised its discretion in refusing admission of this proposed evidence. What the Petitioners describe as "smoking gun" memos were simply general expressions of personal opinion, having nothing to do with Jane's specific IEP, written several years before any of Jane's IEPs even took place. The District Court, and Court of Appeals, properly found that those memos had no bearing on the issues here.

In their Petition to this Court, the Petitioners also try to re-cast the case as one which turns upon the assignment of the burden of proof by the Administrative Hearing and Reviewing Officers, or by the District Court. In reality, the decisions of these tribunals were made based upon a straightforward weighing of all the evidence, independent of the assignment of any burden. Furthermore, inasmuch as the Petitioners sought to challenge the IEP, change the existing placement, and then challenge the administrative decision, the burden properly rested with them, according to well-settled law.

In addition to seeking review of Jane Doe's special education placement, the Petitioners also sued the School System and its special education administrator for substantial monetary damages. They alleged that the School System's proposed IEP and related actions violated Section 504 of the Rehabilitation Act ("Section 504"), as well as federal rights protected by 42 U.S.C. § 1983 ("Section 1983"). The District

Court properly dismissed these monetary damages claims on summary judgment. As a preliminary matter, the District Court and Court of Appeals held that the Petitioners had waived these claims, by raising, and then abandoning, them in the administrative proceedings. Moreover, the District Court correctly observed that the record contained absolutely no evidence even suggesting the "bad faith," "gross misjudgment," and intentional discrimination necessary to support such claims. Even Petitioners' own expert witnesses did not claim that (JA 1280; JA 1761-62). Neither of the Hearing Officers found any evidence of discrimination, and the uncontroverted evidence confirmed that Jane made educational progress in the very program that Petitioners had tried to assail. Petitioners themselves admitted as much (JA 1691, 1719).

The decisions of the administrative Hearing and Reviewing Officers, the District Court, and the Court of Appeals carefully considered the individual facts concerning the Student's specific situation, and applied established law in concluding that the school system had complied with the IDEA. There is no reason for this Court to grant Certiorari to review it further.

STATEMENT OF FACTS[4]

A. The Student.

Jane Doe was born on April 28, 1988, and is now 12 years old. During the 1996-97 and 1997-98 school years at issue, she attended Arlington Traditional School ("ATS"), for second and third grades, respectively.

Jane's primary disabling condition has been identified as Mental Retardation (JA 792, 861-66). In addition, her attention deficit hyperactivity disorder ("ADHD") so significantly impacted her education that it was considered an additional

---

4. The school system disagrees with Petitioners' statement of facts. It includes inflammatory rhetoric and numerous factual representations unsupported by any citation to the record, and which, regrettably, are in many cases distorted or simply inaccurate.

disability, designated "Other Health Impairment." (JA 910-11; JA 876-77,¶ 5).

The primary consequences of Jane Doe's disabilities are significant cognitive and adaptive behavior deficits that place her far below the levels of her age and grade peers. The administrative Hearing Officer noted that Jane's IQ "is significantly lower" than that of her age and grade peers. (JA 1019). Psychological evaluations have determined her full-scale IQ to be between 45 and 59, primarily within the moderately-mentally retarded range (JA 796-803, 804-08, 861-66, 898, 900,¶ 4(b)). Jane's level of adaptive functioning (in areas such as communication and daily living skills) is also far below her age and grade peers, and comparable to her cognitive deficits (JA 802, 808, 865-66, 898).

As to academics, when Jane was nearly nine, her "functioning in basic academic areas" was more "consistent with the functioning of a child of approximately 4 ½ to 5 ½ years of age." (JA 898; *see also* JA 884,¶ 8; 891,¶ 5(a)). Thus, while her regular education second grade classmates were reading multi-chapter books, Jane was "still struggling to learn the sounds associated with letters, and to learn a few basic sight words." (JA 891,¶ 5(b); *see* JA 814 & 832). Likewise, unlike the regular education students who were performing complex addition, subtraction, multiplication and division, Jane knew "only the first few math facts, such as 1 + 1." (JA 891, ¶ 5(a)).

Contrary to Petitioners' unsupported claims that Jane performed better academically in group environments, the evidence established, and the administrative Hearing and Reviewing Officers found, that Jane had profound difficulty with academic subjects in a highly distracting, large-group setting. For example, Jane's regular education second grade teacher explained that, even while on medication for her ADHD, Jane "continues to be distractible and impulsive" in the regular classroom (JA 892,¶ 6(a)). In the regular class, Jane could "stay

on task for no more than a few minutes by herself," while the regular education students were "expected to work independently on a variety of assignments for approximately 45 minutes at a time." (*Id.* ¶ (6)(b)). Jane's distractibility in the large, regular education setting continued to present significant problems during the 1997-98 school year as well (JA 1912, ¶ 6). Even Petitioners' own private consultants agreed that Jane needed a self-contained, small-group setting to obtain educational benefit (JA 809; 906).

B. Jane's Educational Program.

The essential issue in this case has always been Jane's appropriate educational placement. The goals, objectives, and content of her Individualized Education Programs ("IEPs") have never seriously been in dispute (JA 922-23, 1189, 1717-1718). At the time of the March 1997 administrative hearing, Jane received the majority of her academic instruction (reading, math, language arts, etc.) in a special education "resource" classroom at ATS (JA 883,¶ 3; 1176-1177). Jane attended a regular, second grade classroom, with her non-disabled peers, for some academic instruction and morning routine (JA 888, ¶ 2). She would participate in music, lunch, physical education, recess, assemblies and field trips with her non-disabled second grade classmates (*id.*). She also received speech/language therapy, and occupational therapy (JA 811). As the Reviewing Officer's decision found, and as the Petitioners admit, she made educational progress while in this program (JA 1216, 1183-1184; 1719-1720).

For the 1997-98 school year (third grade), Jane received core academic instruction in ATS' Cognitive Disabilities program, later renamed the "PACE" program[5] (JA 1191-1193; 1197-1198). The PACE classroom was small, 4-5 students with cognitive profiles similar to Jane's, and was taught by a certified special education teacher with a Masters Degree (JA 1191-1193). It provided intensive, direct instruction in Jane's weakest academic areas, in a setting where the curriculum and special education services are "integrated together" (JA 1193, 1201).

---

5. "PACE" is an acronym for "Primary Academic Core Enrichment." *See* JA 1907, ¶ 2.

Jane also participated in a regular education third-grade class for all non-academic activities (which comprise more than one-third of hours Jane spends in school each week), as well as 30 minutes per week each in social studies and science with her regular education third-grade teacher (JA 1911-1912, ¶ 3).

There is no dispute that Jane benefited from her instruction and made progress during the 1997-98 school year (JA 1907-1908, ¶ 3). Even the Petitioners agreed: "*She has made progress in areas of language skills and reading skills. She has made progress in mathematical skills . . . . Diction is much better. Her writing is better. She is identifying words in sentences better.*" (JA 1691 [John Doe]) (emphasis added); (*see also* JA 1719-1720 [June Doe]).

C. Facts Established in the Administrative Proceedings.

The essential facts relating to this case are well-summarized in the thorough and detailed administrative opinions below (JA 995-1045; JA 1203-1221).

At the initial March 11, 1997 administrative hearing, the Petitioners elected not to introduce any live testimony, but rather to rely on the 200-plus documents which they had submitted (JA 1010). The parties further agreed that the School System would present its witnesses' testimony by way of written statements from Jane's teachers and other school staff (JA 1012).

The Hearing Officer found that the School System's self-contained program for academic subjects, with mainstreaming for other subjects and activities (as recommended by school staff), would provide a least restrictive appropriate environment within which to implement Jane's IEP (JA 1021, 1043). The Hearing Officer also found that the placement proposed by the Petitioners was not appropriate, stating that "[Jane] does not need the inclusion mainstreaming sought by [Jane's] parents but a self-contained program for academic subjects with mainstreaming for other subject and activities as recommended

by Dr. Crawley." (JA 1039). In addition, he rejected the Petitioners' allegations of "discrimination," finding "no evidence that ACPS officials discriminated against [Jane] making it difficult for her to receive FAPE [free appropriate public education]." (JA 1025).

The Petitioners appealed the Hearing Officer's decision to an administrative Reviewing Officer. In a June 9, 1997 hearing, the Petitioners, this time, elected to call live witnesses. Those witnesses included teachers and school staff who testified extensively about the then-proposed program for the upcoming 1997-98 school year, under an updated April 9, 1997 IEP (*e.g.*, JA 1150). The Parents' witnesses also included their own educational expert, Dr. Carole Semango-Sprouse. After considering the entire record, including the additional testimony, the Reviewing Officer affirmed all aspects of the Hearing Officer's decision. He specifically endorsed as appropriate the April 1997 IEP and proposed placement in the self-contained PACE classroom for academic instruction, together with regular education instruction for all other subjects and activities (JA 1215).

Both administrative decisions contained extensive findings of fact, which were fully supported by detailed references to the evidence. Given the thoroughness of these findings, and the deference that must be accorded them, the School Board adopts, as the remainder of its Statement of Facts, each of the factual findings contained in the Hearing Officers' decisions (JA 1008-38; JA 1206-20).

D. The District Court's Affirmance of the Hearing Officers' Decisions, and Dismissal of Statutory Claims on Summary Judgment.

Petitioners appealed the administrative decisions by filing a Complaint in the District Court on March 18, 1998 (JA 16). In a preliminary motion, the Court dismissed all claims against School System special education administrator Dr. Alvin Crawley. The District Court further held that a personal injury

tort claim against the School Board (Count V) failed to state a legally cognizable claim (JA 49). Those rulings are not included in the Petition.

On December 7, 1998, the School Board moved for summary judgment (JA 437). The School Board asked the Court to decide the case on the Administrative Record and additional evidence of subsequent events presented by the School Board pursuant to 20 U.S.C. § 1415(e)(2)(1996) (JA 666).

On March 18, 1999, the District Court issued a comprehensive Memorandum Opinion, affirming the Hearing and Reviewing Officers' decisions, and granting summary judgment on Petitioners' related Section 504 and Section 1983 claims (Pet. App. 4a-26a).

The evidence fully supported the District Court's conclusion that for academic subjects, Jane needed a self-contained special education placement. This conclusion rested on the opinions of those who best know Jane's educational abilities and disabilities — her teachers. Moreover, everyone, including the Petitioners themselves, agreed that Jane made academic progress during the years at issue.

The Court of Appeals properly affirmed the District Court (Pet. App. 1a-3a). After specifically upholding the District Court's finding that the full inclusion program promoted by Petitioners would *not* meet her educational needs, the court generally supported all other holdings of the lower court as well (Pet. App. 3a). "We have fully considered all of Doe's remaining arguments. After careful review of the extensive record, the briefs and arguments of counsel, and the relevant legal authorities, we reject them and affirm the grant of summary judgment to the Board for the reasons stated by the district court." (Pet. App. 3a).

REASONS FOR DENYING THE WRIT

I. THE ADMINISTRATIVE AND DISTRICT COURT DECISIONS DID NOT DEPEND UPON ALLOCATION OF THE BURDEN OF PROOF, THE PARENTS DID NOT RAISE THE ISSUE BELOW, AND THE BURDEN WAS PROPERLY PLACED ON PARENTS — AS THE PARTY CHALLENGING THE IEP — IN ANY EVENT.

A. Petitioners Did Not Raise the Issue Below.

In their Petition, the Petitioners suggest that this Court should issue a writ of certiorari in this case in view of the "importance of the issue" of which party bears the burden of proof in proceedings under the IDEA (Petition 22). Petitioners neglect to mention that they did not properly preserve this argument below. In their brief to the Administrative Reviewing Officer, the Petitioners, by counsel, made no reference to the applicable burden of proof at all (JA 1081-1109). Nor was any such claim alluded to either in the Complaint (JA 16), or in the Petitioners' Brief in Opposition to Summary Judgment submitted to the District Court (JA 540).

Petitioners abandoned, and therefore waived, their argument on the allocation of the burden of proof prior to the District Court level because they failed to argue this issue during the second round of administrative hearings before the Administrative Reviewing Officer. *E.g.*, *Leonard v. McKenzie*, 869 F.2d 1558, 1563 (D.C. Cir. 1989). Even if this claim was not abandoned in the administrative proceedings, it could not have been raised in the Court of Appeals, nor be raised in this Court, since it was never properly presented in the District Court. *See Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) (issue not raised in the district court could not be raised for the first time in the appellate court); *Montana Dep't. of Revenue v. Kurth Ranch*, 511 U.S. 767, 772 n.9 (1994) (this Court declined to address issue since it was not raised below); *Federal Trade Comm'n v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983) (same).

Petitioners were represented by Counsel at all levels of this proceeding yet chose not to raise the issue of burden of proof at the Administrative appeal or District Court level, so they should not be allowed to raise it in this Court. Any other result would permit parties to bypass Congress' carefully constructed administrative review process. Certiorari should be denied for this reason alone.

B. The Administrative and District Court Decisions Do Not Depend Upon Allocation of the Burden of Proof.

It is not surprising the Petitioners failed to raise the burden of proof as an issue, since it made no difference to the administrative decisions, or to the District Court's decision, below. This Court should not grant certiorari to review a collateral issue that is not essential to the decisions below.

For example, the administrative Reviewing Officer's decision never even mentioned which party bore the burden of proof (JA 1202-1220). Instead, the Reviewing Officer simply discussed the evidence, particularly the live testimony which he had heard (JA 1202-1220). On the basis of his personal assessment of that testimony, he concluded that the school system program was appropriate for Jane Doe, and that the Parents' proposed program was not (JA 1220, 1214A-1215). His decision in no way turned upon the assignment of the legal or evidentiary burden.

Similarly, while the Hearing Officer, and the District Court recited, preliminarily, the familiar rule that the plaintiffs bear the burden of proof, neither of those opinions indicate that the decisions in any way depended upon assignment of that burden. The Hearing Officer and District Court clearly did not see the evidence as in equipoise. Nor did either of them suggest that the school system had failed to produce evidence as to some point which, but for assignment of the burden of proof to the Petitioners, would have required a judgment against the school system. *See Bristow v. Drake Street, Inc.*, 41 F.3d 345, 353 (7th Cir. 1994) (error in assigning burden did not justify reversal

because, "[i]f the trier of fact, having heard all the evidence, comes to a definite conclusion, he has no occasion to invoke a burden of persuasion.").

Indeed, as the Hearing Officer noted in his decision, even if the burden of proof had been placed on the school system, "*the school system has shown ample compliance therewith.*" (JA 1040). The Review Officer held likewise: "*When one considers both the facts and the law, it is clear that [the Student] is receiving [education in] the least restrictive appropriate environment. . . .*" (JA 1214A).

In this case, assignment of the burden of proof is simply a makeweight argument, created in a belated attempt to assail the decisions below. Since that issue was not important to the District Court, or to the administrative Hearing or Reviewing Officers, there is no reason for this Court to review it now.

C. The Administrative Hearing Officer, and the District Court, Correctly Assigned the Burden of Proof to the Parents.

In any event, this Court need not issue a writ of certiorari to review the decision below since the administrative Hearing Officer, and the District Court, correctly allocated the burden of proof according to well-established law (JA 1038-1039, Pet. App. 9a).

As this Court said in the seminal case of *Board of Education v. Rowley*, 458 U.S. 176, 208 (1982), "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy' " (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)). This Court stated that:

> In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a

> handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.

Id. at 207 (footnote omitted).

Courts have properly construed this directive to require that the party challenging a student's Individualized Education Plan ("IEP") must bear the burden of proof. *Johnson v. Independent School Dist. No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986) (placement proposed in IEP is presumed to be correct). Any other rule would fail to give proper deference to the expertise of the teachers and school officials who have primary responsibility for providing an appropriate special education under IDEA. In this case, the burden of proof was properly placed on the Petitioners as the party challenging the IEP (JA 1038-1039).

Likewise, the District Court properly assigned the burden to the Petitioners, who sought to overturn the administrative decisions (Pet. App. 9a). The Court of Appeals has long held that parties "seeking to overturn a decision by a state hearing officer . . . properly bears the burden of proof in showing that the [administrative] decision was erroneous." *Barnett v. Fairfax County School Board*, 927 F.2d 146, 152 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991) (citing *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258 n.2 (4th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989)).

Although the Petitioners claim that the Court should take this case to resolve a split in the Circuits, the cases cited in their own Petition illustrate that the Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits all apply the same rule as the Fourth Circuit (Petition 18-19) — the party challenging the administrative hearing officer's decision bears the burden of proof at the District Court level. *Salley v. St. Tammany Parish*

Sch. Board, 57 F.3d 458, 467 (5th Cir. 1995) (finding that the Act creates a presumption in favor of the IEP); *Doe v. Bd. of Educ.*, 9 F.3d 455, 458 (6th Cir, 1993), *cert. denied*, 511 U.S. 1108 (1994) (appellant had burden of proof); *Heather S. v. Wisconsin*, 125 F.3d 1045, 1052 (7th Cir. 1997) (Court held that "[t]he party challenging the outcome of the state administrative decision bears the burden of proof"); *E.S. v. Independent Sch. Dist., No. 196*, 135 F.3d 566, 569 (8th Cir. 1998) ("the party challenging outcome of state administrative hearings has the burden of proof"); *Clyde K. v. Puyallup Sch. Dist., No. 3*, 35 F.3d 1396, 1398-99 (9th Cir. 1994) (finding that generally a party challenging an agency's decision bears the burden of proof); *Johnson*, 921 F.2d at 1026 (party challenging the IEP has the burden of proof). In addition to the cases cited by Petitioners, the First Circuit and D.C. Circuit apply this same standard. *Roland M. v. Concord Sch. Comm.* 910 F.2d 983, 991 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1991) ("burden rests with the complaining party to prove that the agency's decision was wrong"); *Kerkam v. McKenzie*, 862 F.2d 884, 887 (D.C. Cir. 1988) (Parents seeking to overturn administrative hearing decision about appropriateness of IEP have burden of persuading court that hearing officer's decision was erroneous).

The above cited cases illustrate that all these Circuits correctly apply this Court's admonition in *Rowley* that the court must give "due weight" to the decision of the administrative proceedings. 458 U.S. at 206.

Only the Third Circuit has erroneously placed the burden of proof on someone other than the challenger at the District Court level. *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1034-35 (3d Cir. 1993); *Oberti v. Board of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993). This rule is inconsistent with *Rowley*. To impose the burden of proof on any party other than the party challenging the administrative decision

would fail to give the administrative decision the "due weight" to which it is entitled.

Assigning the burden of proof to the party attacking the administrative decisions is also consistent with traditional principles of trial procedure in the Anglo-American system, which generally require the plaintiff to bear the burden of proof. *E.g.*, *Clyde K.*, 35 F.3d at 1999 (in criticizing *Oberti*, court observed that the "[a]llocation of the burden of proof has long been governed by the rule that the party bringing the lawsuit must persuade the court to grant the requested relief.").

In any event, to the extent that the Third Circuit's rule may be aberrational, this is not the case to address it. This decision below is not from the Third Circuit, and the issue was not even material to the outcome of the decisions at any stage of the proceedings.

II. THE COURTS BELOW CORRECTLY EXERCISED JUDICIAL DISCRETION CONSIS-TENT WITH IDEA AND OTHER CIRCUITS IN DETERMINING WHAT EVIDENCE COULD BE INTRODUCED AT THE DISTRICT COURT LEVEL.

Petitioners next contend that this Court should grant certiorari to "end the confusion" among courts as to the appropriate standard for the admission of additional evidence at the District Court level (Petition 27). There is no such "confusion" among the circuits, and, in any event, on the facts of this case, the trial court did not abuse its discretion in excluding the evidence at issue.

The IDEA provides that disputes concerning a child's special education placement are initially to be heard and decided by an administrative hearing officer. 20 U.S.C. § 1415(b)(2) (1996).[6] Parties aggrieved by the administrative decision may

---

6. In Virginia, there is a two-step administrative hearing process. 8 VAC 20-80-70(A)(10) & (11).

file an action in U.S. District Court pursuant to 20 U.S.C. § 1415(e)(2) (1996). Under the statute, the District Court is required to decide the case based on a preponderance of the evidence after "receiv[ing] the records of the administrative proceedings," and considering any "additional evidence" it might hear. *Id.*

When interpreting Section 1415(e)(2), this Court clearly stated that "the provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Rowley*, 458 U.S. at 206. This Court further stated that:

> The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings.

Id. To "give meaning" to these principles, it has been uniformly held that admission of "additional evidence" beyond the Administrative Record cannot be limitless. *E.g.*, *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659, 666-67 (4th Cir. 1998) (citing cases). Indeed, in *Springer*, the court observed that to do otherwise would "reduce the proceedings before the state agency to a mere dress rehearsal by allowing appellants to transform the Act's judicial review mechanism into an unrestricted trial *de novo*." *Id.* at 667 (quoting *Roland M.*, 910 F.2d at 997).

Petitioners suggest that the IDEA requires a District Court to hear any "additional evidence" that a party wants to introduce

(Petition 26). Yet the other Courts of Appeal have, like the Fourth Circuit, consistently interpreted and applied IDEA's "additional evidence" requirement to allow district courts to exercise judicial discretion in determining the admissibility of such proposed evidence.

The First Circuit was the first to interpret the "additional evidence" clause of Section 1415(e)(2):

> We construe "additional" in the ordinary sense of the word, . . . to mean supplemental. . . . We are fortified in this interpretation because it structurally assists in giving due weight to the administrative proceeding, as *Rowley* requires.

Town of Burlington v. Department of Educ., 736 F.2d 773, 790 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985) (footnote omitted). The First Circuit went on to explain that, "[t]he determination of what is 'additional' evidence must be left to the discretion of the trial court which must be careful not to allow such evidence to change the character of the hearing from one of review to a trial de novo." *Id.* at 791. This Court's affirmance of *Burlington* did not disturb the First Circuit's ruling on this point in any way.

The Third, Fourth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuit have all adopted the same basic test as the First Circuit. *See e.g.*, *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1472-73 (9th Cir. 1993), *cert. denied*, 513 U.S. 825 (1994) (adopting the "well-reasoned decision" of the First Circuit); *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 760 (3d Cir. 1995) ("[i]t is regularly held that the question of what additional evidence to admit in an IDEA judicial review proceeding, as well as the question of the weight due the administrative findings of fact, should be left to the discretion of the trial court."); *Monticello Sch. Dist. No. 25 v. George L.*, 102 F.3d 895, 901 (7th Cir. 1996) ("a district court is

not required to allow all evidence proffered by a plaintiff in an IDEA proceeding"); *E.S.*, 135 F.3d at 569 ("[a]lthough the IDEA permits a court reviewing the administrative process to admit additional evidence, 'a party seeking to introduce additional evidence at the district court level must provide some solid justification for doing so.' "); *Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 927 (10th Cir.) (emphasis added), *cert. denied*, 516 U.S. 909 (1995) (district court must only review additional evidence "*if necessary* [to] make a decision based on the preponderance of the evidence, while giving 'due weight' to the administrative proceedings below.") (emphasis added).

Even the Sixth Circuit — which Petitioners claim rejects the First Circuit's analysis in *Burlington* — has disagreed with *Burlington* only to the extent that it somehow could be read to impose an *exclusive* list of the evidence that may be admitted as "additional." Ultimately, the Sixth Circuit agrees with the First Circuit to the extent that the determination of admitting additional evidence should be left to the discretion of the trial court. *Metropolitan Gov't of Nashville v. Cook*, 915 F.2d 232, 234-35 (6th Cir. 1990). The Eleventh Circuit specifically adopted the standard of the First, Seventh and Ninth Circuits, and found that, "the difference between the First and Sixth Circuits on this point would seem to be more semantical than substantive." *Walker County Sch. Dist. v. Bennett*, 203 F.3d 1293, 1299 (11th Cir. 2000).

While the Petitioners suggest that the Fourth Circuit applies a rigid rule of disallowing all testimony by individuals who were available at the time of the administrative hearing, this is not the case. The Fourth Circuit, like all the Circuits, explicitly adopted the test of the First Circuit, giving the trial court discretion to determine when "additional evidence" is appropriately admitted in an IDEA case. *Springer*, 134 F.3d at 667 (citing *Burlington*, 736 F.2d at 790). While the court in *Springer* did exclude the proffered testimony on the ground that

it could have, and should have, been introduced in the administrative proceedings, the court did not pronounce an inflexible rule as the Petitioners suggest. Rather, it held, quoting directly from *Burlington*, 736 F.2d at 790, that the exclusion of such testimony is " 'an appropriate limit in many cases.' " 134 F.3d at 667.

The District Court's evidentiary decision was reviewable by the Court of Appeals simply for an abuse of discretion. This Court need not and should not grant certiorari to review individual exercises of discretion by district courts.

Furthermore, the District Court's exercise of discretion to exclude the Parents' proposed additional evidence was well-grounded. The "additional evidence," at issue in this case, was primarily testimony of two new expert witnesses (Jerold Bruns and Elsa Giles), regarding matters which could have been raised at the administrative hearing (*see* JA 629-31). Though the various Circuits' formulations of proper "additional evidence" are not materially different, under any standard, the District Court had discretion to refuse to permit this testimony.

Moreover, even if this were an ordinary civil case, not subject to the IDEA's limitations on "additional evidence," the trial court would have been well within its discretion to refuse such evidence. This Court has emphasized that a District Court has "broad latitude" as a "gatekeeper" to exclude expert testimony that it does not deem to be sufficiently reliable under the specific facts presented. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142, 145 (1999). In the present case, the opinions of the proposed experts were plainly unreliable. The District Court properly found that Petitioners' experts, Dr. Bruns and Ms. Giles, "lacked any concrete details" in support of their opinions (JA 746). Neither "expert" even saw the student during the years at issue (JA 1261, 1268-69, 1270-71 [Bruns]; JA 1750 [Giles]), and neither spoke to any of Jane's teachers from those years, or

reviewed the teachers' testimony from the Administrative Hearings (JA 1263, 1266-67 [Bruns]; JA 1751-53 [Giles]). They could not say whether or not Jane received educational benefit during one of the school years at issue (1996-97) (JA 1754-55 [Giles]; JA 1281 [Bruns]). Ms. Giles could not even endorse the Petitioners' claim that Jane should have received fully mainstreamed instruction for all of her classes (JA 1756-57). Likewise, neither of them could explain any details of how a totally regular education program might be implemented for Jane (JA 1766, 1768-69 [Giles]; JA 1284 ("it would be presumptive and silly of me to say" how to implement full inclusion program [Bruns]).

The other additional "evidence" that the Petitioners claim should have been considered consisted of the so-called "smoking gun" memoranda written by school personnel years before the Student's IEP was even written, let alone implemented. Again, the District Court, did consider the proffered evidence, and decided, in its discretion, that the memos were irrelevant and therefore inadmissible (Pet. App. 18a). The District Court correctly held that the memos Petitioners attempted to introduce to the court were nothing more than an irrelevant distraction from the main issue of whether or not Jane received an appropriate special education program. The Court observed that:

> [t]he memos written years before the time periods at issue reveal that they say nothing about the student, as even the plaintiffs admit. Plainly, they are not relevant here. Plaintiffs have no facts to suggest that these general memos were connected to placement decisions about Jane Doe three, four and five years later.

(Pet. App. 17a-18a). The author of one of the memos testified that they had absolutely nothing to do with Jane (JA 1871). Even Jane's mother had to admit that the memos say nothing about Jane (JA 1739).

Moreover, the memos were in no way the admissions that Petitioners struggle to make them (Petition 16). Rather, the District Court observed that unrebutted testimony from the memos' authors established that they were "merely opinions advocating even greater improvements within the school system." (Pet. App. 18a). For example, the authors of the memoranda testified that at no time before, during or after the time of the memos was the school system out of compliance with the IDEA or other special education statutes (JA 1773, 1782, 1787, 1791-92 [Dr. Gosling]; JA 1857-58, 1870, 1874 [Ellen Kahan]). The author of one memo, former school system superintendent Dr. Arthur Gosling, confirmed that neither one accurately described the situation in the school system as of the times at issue in this case (JA 1791-92). The authors testified that the concept memos were simply part of an effort "to constantly examine and improve educational programs" and "an advocacy instrument . . . to make a strong statement to our leadership cadre that we could do better and we would do better." (JA 1789 [Dr. Gosling]; JA 1854 [Ms. Kahan]). There was no testimony or other evidence to the contrary.

Since the court found no connection between the memoranda and Jane's placement during the school years in issue, it was clearly correct in holding that they were irrelevant and inadmissible. It is elementary that irrelevant evidence is inadmissible. Fed. R. Evid. 402 (only relevant evidence admissible). A district court has broad discretion to make such determinations, and its discretion should not be disturbed unless there is a "showing of clear abuse of discretion." *Beacham v. Lee-Norse*, 714 F.2d 1010, 1014 (10th Cir. 1983).

The memoranda were not admissible for yet another reason. Though they were apparently available to the Petitioners, they were never introduced into evidence during the administrative proceedings (JA 1737-38). Accordingly, the District Court also would have been well within its discretion in excluding the memoranda as improper "additional evidence" under the rule applicable in IDEA cases discussed above (*see supra* at II).

In sum, the District Court's exclusion of irrelevant and tardily-proffered evidence was not an abuse of discretion under any Court's standards.

III. THE DISTRICT COURT AND COURT OF APPEALS CORRECTLY DISMISSED THE PETITIONERS' SECTION 504 AND SECTION 1983 CLAIMS.

In addition to their IDEA claims, the Petitioners recast the same contentions as claims for damages under Section 504 and Section 1983, alleging that the school system did not provide an appropriate placement for the Student.

First, the courts below properly held that the Petitioners had waived those claims by raising, and then abandoning, them in the administrative proceedings. Second, as a general matter, a jury trial is not required where the law and the evidence demonstrate — as they did here — that a plaintiff would not be entitled to judgment as a matter of law. Third, the special statutory scheme which applies to Section 504 and/or Section 1983 claims related to special education placement provides for review by the District Court, not a jury. For all these reasons, summary judgment was properly granted.

A. The District and Appellate Courts Properly held that Petitioners Were Required to Exhaust Their Administrative Remedies Prior to Bringing Their Section 504 Claim.

The courts below properly held that by raising discrimination claims in the administrative proceedings, and then abandoning them, the Petitioners had waived the opportunity to make those same claims in their lawsuit (Pet. App. 19a, 2a). Contrary to Petitioners' claim, there is not a split in the Circuits as to whether administrative exhaustion is required. IDEA clearly mandates that the administrative remedies specified in IDEA must be exhausted prior to bringing

a parallel claim under Section 504 or other statutes.[7] 20 U.S.C. § 1415(f) (1996) ("before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.").

This exhaustion requirement is held to require administrative exhaustion of all Section 504 or similar statutory claims where, as here, the claims are fundamentally allegations that a school system has failed to provide an appropriate special education program for a disabled child, except where exhaustion would be futile.[8] *E.g.*, *Weber v. Cranston Sch. Comm.*, 212 F.3d 41 (1st Cir. 2000) (Court held that plaintiff failed to exhaust administrative remedies and failed to raise any arguments that exhaustion would be futile); *Charlie F. v. Board of Educ.*, 98 F.3d 989, 992 (7th Cir. 1996) (exhaustion required where Section 504 claim related to appropriateness of special education program, even though plaintiffs sought money damages not available under IDEA); *N.B. v. Alachua County School Bd.*, 84 F.3d 1376, 1379, (11th Cir. 1996), *cert. denied*, 519 U.S. 1092 (1997) (exhaustion required even though money damages sought); *Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1095 (1st Cir. 1989) (exhaustion required since violations allegedly committed by the school system "fit within the protectional provisions of § 1415 of the [IDEA]."). *See also Hope v. Cortines*, 69 F.3d 687 (2nd Cir. 1995). The fact that a plaintiff seeks money damages which are not available under IDEA does not bypass the exhaustion requirement. *Charlie F.*, 98 F.3d at 992; *N.B.*, 84 F.3d at 1379. Any other result would enable litigants to adjudicate special education

7. Accordingly, the Petitioners' reliance on *Sims v. Apfel*, 120 S. Ct. 2080 (2000), is misplaced (Petition 29). Unlike the statute in *Sims*, the IDEA specifically requires parties to exhaust their administrative remedies prior to bringing a claim under Section 504.

8. There has never been any allegation that exhaustion would have been futile in this case.

disputes without resort to the administrative process simply by recasting IDEA claims as claims under Section 504 or Section 1983 seeking money damages.

The Petitioners' reliance upon *Witte v. Clark County School District*, 197 F.3d 1271 (9th Cir. 1999) is misplaced (Petition 28). In that case, there was no longer any live IDEA issue, since the parties had reached agreement on those matters. *Witte*, 197 at 1276. The only remaining claims were tort-type claims for physical abuse and injury. *Id.* This is fundamentally unlike the Petitioners' claims, which allege a failure to provide Jane an appropriate special education program, and a demand for her placement in a full-inclusion program.

Here, just as in *Charlie F.* and *Christopher W.*, the District Court and Court of Appeals correctly observed that the Section 504 claim was a carbon copy of Petitioners' IDEA claim — based upon an alleged denial of a free appropriate public education under IDEA. The Petitioners' Complaint specifically alleged that the School Board violated Section 504 because Jane was allegedly "denied the benefits of a free appropriate public education in the least restrictive environment solely by reason of handicap of plaintiff Jane Doe." (JA 26). Indeed, the caption of Count I itself is, "Refusal to educate in the least restrictive environment in violation of IDEA, Section 504 and Virginia law." (JA 25). The Petitioners themselves testified that the "discrimination" they were complaining of was that Jane's educational program was assertedly inconsistent with IDEA (JA 1695-96 [John Doe]; JA 1721 [June Doe]). Accordingly, even though Petitioners were seeking money damages, exhaustion of their administrative remedies was properly required, since their Section 504 claim was the same as their IDEA claim. *Charlie F.*, 98 F.3d at 992; *N.B.*, 84 F.3d at 1379.

Similarly, Petitioners' arguments that exhaustion should not have been required in this case because "the regulations governing due process hearings in Virginia do not allow the parents to raise at the administrative hearing issues of systemic

or class wide violations of the law" and "the systemic relief sought by Petitioners in their Section 504 claim was not available in the due process hearings," are not supported by the record (Petition 28). This case is about the appropriate education of one individual student during two academic years; it does not concern the placement of special education students in general. The Petitioners' Section 504 claim was based on the allegation that the school system failed to provide *Jane* with an appropriate education, not the placement of other children (JA 26). Indeed, as one of the Magistrate Judges observed below in response to similar theories cast about Petitioners, "this is not a class action." (JA 300). In any event, the Petitioners raised the issue of discrimination at the initial due process hearing, and the Hearing Officer found a complete absence of any evidence of improper "discrimination" against Jane (JA 1025-26; 1215).

Finally, Petitioners' contention that they were not aware of and did not have the memoranda when they exhausted their administrative remedies is also not supported by the record in this case. (Petition 29). It is undisputed that the memos were never kept "secret" by the school system, but were in fact handed out to parents on an advisory committee (JA 1871 [Kahan]; JA 1883-84 [McKey]). Ms. Doe even testified that, to the best of her recollection, she learned of memos *before* the June 1997 administrative hearing in this case (JA 1735-36).

B. Petitioners were Not Entitled to a Jury Trial on their Discrimination Claims Since They Failed to Provide Any Evidence that the School System Exercised Bad Faith and Gross Misjudgment.

The Appellate and District Courts correctly held that the Petitioners' Section 504 claim failed since their parallel IDEA claim failed (Pet. App. 2a, 21a). It is well established that a claim under Section 504, requires proof that the School Board's educational decisions relating to a student were so inappropriate

as to constitute "*either bad faith or gross misjudgment.*" *Sellers v. School Board of Manassas*, 141 F.3d 524, 529 (4th Cir.), *cert. denied*, 525 U.S. 871 (1998) (emphasis added) (citation omitted). "To prove [Section 504] discrimination in the education context, 'something more than a mere failure to provide the 'free appropriate education' required by [IDEA] must be shown.' " *Sellers*, 141 F.3d at 528 (citation omitted).

A party is not entitled to have his claims tried by a jury simply because he asks for damages in the lawsuit. Rather, that lawsuit must raise material issues of fact which require a trial. If, after discovery, a plaintiff has not developed the factual support necessary to raise a genuine issue of material fact on his claims, the case may be decided on summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). This in no way denies a party its right to a jury trial. *E.g.*, *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320 (1902) (Court held that the District of Columbia's summary judgment rule did not deprive the parties of the right to trial by jury).

On the record which was before the District Court on summary judgment, the absence of any "bad faith or gross misjudgment" in this case was clear. Perhaps most telling of all, as the District Court observed, (Pet. App. 22a), both of Petitioners' own paid educational experts in this case conceded that the school system's actions, even if incorrect, did not rise to the level of "bad faith or gross misjudgment" (JA 1280 [Bruns]); (JA 1761-1762 [Giles]). Ms. Giles even conceded that the Student's placement in a self-contained setting for academics was "consistent with the traditional paradigm for the placement of students with cognitive disabilities — a paradigm which exists in many school systems . . ."(JA 1765).[9]

---

9. Strikingly, Ms. Giles, who oversaw three self-contained classes for special education students in Maryland, admitted during her (Cont'd)

Further, the District Court correctly held that the so-called "smoking gun" memos did not support a claim for discrimination under Section 504 (Pet. App. 18a). As stated in Section II of this Brief, the District Court held that the memos did not say anything about the student in this case, or her educational placement (Pet. App. 18a). The District Court found that the memos were no more than the opinions of the authors (Pet. App. 18a).

The District Court also correctly found no evidence that the School Board acted intentionally to discriminate against Jane (Pet. App. 22a, citing *Marvin H. v. Austin Indep. Sch. Dist.*, 714 F.2d 1348, 1357 (5th Cir. 1983); *Sellers v. School Bd.*, 960 F. Supp. 1006, 1010 (E.D. Va. 1997), *aff'd*, 141 F.3d 524 (4th Cir.), *cert. denied*, 525 U.S. 871 (1998). Even Jane's mother admitted that, "*I don't believe that [school officials] set out to cause her physical, emotional or educational harm.*" (JA 1731-1733) (emphasis added).

The courts below likewise correctly dismissed the Section 1983 claim. It was also based solely upon the alleged violations of IDEA and Section 504 (Complaint, JA 27, ¶ 31), which failed to survive summary judgment. Section 1983 creates no substantive rights, but rather, merely provides a cause of action for vindication of rights protected by federal law. Thus, where the underlying statutory claim fails, the derivative Section 1983 claim must also fail. *E.g.*, *Sellers*, 960 F. Supp. at 1011-12; *Jones v. Washington County Bd. of Education*, 15 F. Supp. 2d 783, 787 (D. Md. 1998).

The Appellate and District Courts also correctly held that, regardless of any putative statutory violation, Petitioners failed to show that any such violation occurred pursuant to an official "policy or custom" of the School Board (Pet. App. 23a, citing

---

(Cont'd)

deposition that even she herself had ***never*** had a cognitively disabled student in the kind of "full inclusion" plan which she advocated for Jane Doe (JA 1744-1745; 1747-1749).

Monell v. Department of Soc. Servs., 436 U.S. 658, 690-91, 694 (1978); *Brubaker v. City of Richmond*, 943 F.2d 1363, 1379 (4th Cir. 1991)). In that regard, Petitioners' reliance upon the 1993 concept memos is misplaced. As noted above, those memos say nothing about Jane or her program, and the unrebutted testimony of the memos' authors established that there never were any statutory violations, let alone a wholesale policy of violating the law.

C. The Statutory Framework Provides for Review of Special Education Placement by the Court, Not a Jury.

In addition, Petitioner's claims were not triable to a jury as they allege. The structure of the IDEA's judicial review provision demonstrates that the court, not a jury, determines whether a school board has complied with the IDEA. 20 U.S.C. § 1415(e)(2). Section 1415(e)(2) sets forth the manner in which aggrieved parties may seek judicial review of a state administrative decision:

> In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision upon a preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(e)(2) (1996). The statute entrusts to "the court" (not "to the court or jury"), the responsibility of receiving and reviewing the administrative record and decision. In reviewing that decision, the district court does not conduct a *de novo* trial. Rather, it is required to give the review officer's decision "due weight." *Rowley*, 458 U.S. at 206.

The statutory structure of the IDEA thus forecloses resort to a jury trial. The Seventh Amendment does not require a jury trial where, as here, it would be inconsistent with the statutory scheme. *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 455-56 (1977) (Congress may

create new statutory obligations, and provide an administrative and judicial enforcement scheme, without the intervention of a jury at any stage); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 (1989) ("Congress may devise novel causes of action involving rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders."). Expressing this principle, the District Court, correctly stated that " 'it would be legally untenable to conclude that, in providing for the plaintiff's education, in a manner that fully complies with the IDEA, the district officials nevertheless, acted in bad faith, or with gross misjudgment, without wholly vitiating the results of our Judgment on the Record.' " (Pet. App. 21a, quoting *Moubry v. Independent Sch. Dist. 696*, 9 F. Supp. 2d 1086, 1111 (D. Minn. 1998)).

For precisely the same reasons, the Petitioners were not entitled to a jury trial on their Section 504 and Section 1983 claims which were based upon the same allegations as their IDEA claims. Indeed, as previously noted, the Petitioners' statutory claims were directly parallel to their IDEA claims, and, therefore, required complete administrative exhaustion. The claims asserted in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990), upon which Petitioners rely, had no similar exhaustion requirement. Petitioners' assertion that they have the right to present their parallel Section 504 and other statutory claims to a jury first, before the court can address the identical claims raised under IDEA, would render the administrative proceedings meaningless, and prevent district courts from deciding IDEA cases only after giving "due weight" to the administrative decisions, as *Rowley* requires. For example, if a student with parallel IDEA and Section 504 claims were permitted to try the Section 504 claims to a jury first, and the jury found a verdict in favor of the student, then the district court would be bound, as a matter of law under principles of *res judicata* and/or collateral estoppel, to enter judgment in favor

of the student on the IDEA claims without giving any "due weight" to the administrative decisions, and, indeed, even if such a ruling were inconsistent with giving "due weight" to those decisions. That cannot be what Congress intended, and it is not the law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ARA L. TRAMBLIAN
Acting County Attorney
CAROL W. MCCOSKRIE
Assistant County Attorney
#1 Courthouse Plaza
Suite 403
2100 Clarendon Blvd.
Arlington, Virginia 22201
(703) 228-3100

THOMAS J. CAWLEY
Counsel of Record
JOHN F. CAFFERKY
ARTHUR E. SCHMALZ
KATHRYN A. GILES
HUNTON & WILLIAMS
1751 Pinnacle Drive
Suite 1700
McLean, Virginia 22102
(703) 714-7400

Attorneys for Respondent

APPENDIX

APPENDIX — STATUTORY PROVISIONS

Individuals with Disabilities Education Act, 20 U.S.C. 1415(b), (c), (d), (e)(1), (e)(2), and (f) (1996)

Section 1415 Procedural Safeguards

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to —

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local education agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit —

(i) proposes to initiate or change, or

(ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents and legal guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardians hall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local education agency or intermediate education unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved to the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct

an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded —

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public) consistent with the requirements of Sec. 1417(c) of this title and shall also be transmitted to the advisory established pursuant to Sec. 1414(a)(12) of this title.

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under

subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the finding and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

* * *

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(3)

No. 99-2028

Supreme Court, U.S.
FILED
JUL 31 2000
CLERK

IN THE

Supreme Court of the United States

JANE DOE, A MINOR, BY HER PARENTS AND NEXT FRIENDS, JOHN DOE AND JUNE DOE, PARENTS,
Petitioners,

v.

ARLINGTON COUNTY SCHOOL BOARD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY TO BRIEF IN OPPOSITION

JOHN F. KARL, JR.*
JODI T. TUER
MCDONALD & KARL
900 17th Street, N.W.
Suite 1250
Washington, D.C. 20006
(202) 293-3200
Counsel for Petitioners

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

14pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY TO BRIEF IN OPPOSITION	1
I. BURDEN OF PROOF ON MAINSTREAMING	2
A. Petitioners Raised the Burden of Proof Below	2
B. Decisions Below Turn on the Allocation of the Burden of Proof	3
C. The School Board is Wrong on the Merits	5
II. PETITIONERS HAD A RIGHT TO SUBMIT "ADDITIONAL EVIDENCE"	7
III. PETITIONERS ARE ENTITLED TO A TRIAL BY JURY	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Bistrow v. Drake Street, Inc., 41 F.3d 345 (7th Cir. 1994)	4
Board of Education v. Rowley, 458 U.S. 176 (1982)	5, 10
Chevron, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)	1
Federal Trade Comm'n v. Grolier, Inc., 462 U.S. 19 (1983)	3
Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)	8
Lascari v. Board of Educ. of Ramapo Indian Hills Regional High Sch. Dist., 116 N.J. 30, 560 A.2d 1180 (1989)	5
Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990)	9
Metropolitan Gov't of Nashville v. Cook, 915 F.2d 232 (6th Cir. 1990)	8
Montana Dep't Of Revenue v. Kurth Ranch, 511 U.S. 767 (1994)	3
Murray v. Montrose County School Dist, 51 F.3d 921 (10th Cir. 1995)	9
Muth v. United States, 1 F.3d 246 (4th Cir. 1993)	3
Oberti v. Board of Educ., 995 F.2d 1204 (3rd Cir. 1993)	2, 5, 6
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)	4
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	1, 7
Walker County Sch. Dist. v. Bennett, 203 F.3d 1293 (11th Cir. 2000)	8

TABLE OF AUTHORITIES—Continued

Statutes — Page

Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et. seq.*, as amended by the IDEA Improvement Act of 1997, Public Law No. 105-17 ..... *passim*

Rehabilitation Act of 1973, 29 U.S.C. § 794, *et. seq.* ..... *passim*

Civil Rights Act of 1871, 42 U.S.C. § 1983 ..... *passim*

Rules

F. R. Civ. P. 9 3

F. R. Civ. P. 8(a) 3

REPLY TO BRIEF IN OPPOSITION

This case presents the fundamental question of the proper role of the federal and state courts in exercising their statutory duty pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*, ("IDEA") to receive the records of the administrative proceedings, to hear "additional evidence" at the request of the parties, and based upon a preponderance of the evidence, grant such relief as the court determines is appropriate. 20 U.S.C. § 1415(e)(2). Respondent Arlington County School Board ("the School Board") attempts to confuse the issues raised in the Petition for Writ of Certiorari by setting forth arguments based on conjecture, an inaccurate rendition of the factual record, fallacious reasoning, and erroneous legal principles. The School Board's Brief in Opposition fails to controvert with any persuasive authority arguments made by Petitioners why this Court should grant Certiorari and concedes there are genuine splits among the views of the Circuits and the Supreme Court of New Jersey.

The School Board relies heavily on the buzz words "due weight" and "deference to the administrative decisions," but never advances any statutory or policy reason for according judicial deference to any of the decisions made by the Hearing Officer or the Reviewing Officer who lacked any substantive expertise in education.[1] *See* Petition for Certiorari at 11. The School Board also fails to recognize that courts below incorporated the legal errors made at the administrative level and neither court ever considered Petitioners' evidence and arguments on the merits. Petitioners are entitled to an evaluation of the evidence and fact finding under correct legal standards. *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982).

---

[1] Deference to the decisions of the Hearing Officers would be appropriate only if they had expertise in the area of education. *See Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

I. BURDEN OF PROOF ON MAINSTREAMING

The School Board seeks to obfuscate the burden of proof issues raised in the Petition for *Certiorari*. There are two distinct burden of proof issues before this Court and there are separate splits in the Circuits over the allocation of the burden of proof at the administrative level and in the District Court. The approach taken by the Fourth Circuit effectively denies the parents any meaningful opportunity for administrative or judicial review of the School Board's refusal to mainstream Jane Doe because the parents have the burden of proof at both the administrative and judicial levels. School systems nationwide routinely mainstream children with far more severe handicaps, such as Down's Syndrome, while the Fourth Circuit allows the Arlington County School Board to segregate its special education students away from general education classrooms under the rubric of excessive deference to the school system and by placing the burden of proof on the parents throughout the administrative and judicial review processes. As a result of the erroneous decision below, the School Board is allowed to ignore the requirements of the IDEA that the removal of handicapped children from the regular classroom may occur only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

A. Petitioners Raised the Burden of Proof Below

The School Board misleads this Court by claiming that Petitioners failed to raise the issue below as to which party bears the burden of proof. This is simply not true. During the administrative proceedings, Petitioners' attorney raised this issue by arguing the well established legal principles outlined in *Oberti v. Board of Educ.*, 995 F.2d 1204, 1218-1220 (3d Cir. 1993) should apply. JA 686, 703. In his decision, the Hearing Officer cites *Oberti* but rejects the legal principle that the school should bear the burden of proving compliance with the mainstreaming requirement at the administrative level. JA

requirement at the administrative level. JA 1038. The Hearing Officer ruled that the parents had the burden to prove that the child's placement proposed by the School Board was *not* the correct placement. *Id.* This is contrary to the approaches taken by Second, Third, Eighth and Ninth Circuits. *See* Petition for Certiorari at 18. The School Board never addresses this split in the Circuits.

Petitioners vigorously argued the precise issue of burdens of proof before the District Court as well. When the School Board moved for summary judgment in the District Court, Petitioners argued that *Oberti* provided the correct rule of law and the burden of proof should properly be placed on the School Board, and not the parents.[2] J.A. 686, 703. Accordingly, the School Board's reliance on *Montana Dep't. of Revenue v. Kurth Ranch*, 511 U.S. 767, 772 n.9 (1994), *Federal Trade Comm'n v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983), and *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) is totally misplaced. Since Petitioners raised the burden of proof issue at the administrative level and in District Court, this issue was properly before the Court of Appeals and properly preserved for review by this Court.

B. Decisions Below Turn on the Allocation of the Burden of Proof

More shocking is the School Board's brazen claim that this Court should not grant certiorari to review the issue of which party bears the burden of proof because it made no difference to the Hearing Officer, the Reviewing Officer, or the District Court in granting their decisions and that the burden of proof is merely

---

[2] The School Board's argument that the initial Complaint failed to include any allegations regarding the burden of proof is puzzling because parties are not required by Fed.R.Civ.P. 9 to plead burdens of proof. Fed.R.Civ.P. 8(a) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief."

a collateral issue that warrants no review by this Court. Brief in Opposition at 11.

The Respondent's argument that the administrative and District Court decisions were made simply based upon a straightforward weighing of all the evidence, independent of the assignment of any burden, is inconsistent with the record below. As the Respondent concedes, both the Hearing Officer and the District Court raised the issue of which party bears the burden of proof at the onset of their deliberations. Brief in Opposition at 11. They both concluded erroneously that the burden was on the parents, and considered this reasoning in reaching their final decisions. To continue to argue that neither of the opinions indicate that the decisions in any way depended upon assignment of that burden is inconsistent with the record below.

To reduce such a fundamental principle of the law, as the allocation of the burden of proof, to a mere collateral issue turns the judicial process upside down on its head. *Who* bears the burden of proof is an essential component that must be considered by any trier of fact in weighing the evidence.

The School Board cites *Bristow v. Drake Street, Inc.*, 41 F.3d 345, 353 (7th Cir. 1994), for the proposition that error in the assignment of the burden in this case does not justify reversal. The portion of *Bristow* cited by the School Board is included in Circuit Judge Posner's conclusion that the District Court did not err in failing to place the burden of persuasion on the employer pursuant to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), because doing so would not have affected the outcome. *Id.* at 353. Here, the evidence as to the appropriateness of the school system's program was not so persuasive that the Hearing Officer and the District Court could come to the same conclusion irrespective of which party carried the burden of proof. Moreover, the courts below clearly believed the placement of the burden of proof was important in determining whether the education plan proposed for Jane Doe by the School Board was appropriate.

C. The School Board is Wrong on the Merits

The School Board readily admits a split in the Circuits on issues relating to the burden of proof, but seeks to defend the rules of the Fourth Circuit. Brief in Opposition at 3. Respondent argues that the administrative Hearing Officer and the District Court correctly allocated the burden of proof to the parents to show that the School Board's refusal to mainstream Petitioner Jane Doe was erroneous. Although Respondent cites numerous Fourth Circuit cases supporting its position, the School Board fails to address the reasoning by the Third Circuit in *Oberti v. Bd. of Education*, 995 F. 2d at 1218-1220. Rather than engaging in any legal analysis, the School Board baldly claims the rule established by the Third Circuit in *Oberti* is inconsistent with *Board of Education v. Rowley*, 458 U.S. 176 (1982) because "[t]o impose the burden of proof on any party other than the party challenging the administrative decision would fail to give the administrative decision the "due weight" to which it is entitled. Brief in Opposition 14-15."

This reasoning is fallacious. The language and reasoning of the *Rowley* Court actually support the proposition that the burden of proof should be placed on the school, not the parents, even in challenging the administrative decision. The *Rowley* Court acknowledged that courts lack the "specialized knowledge and experience" necessary to resolve issues regarding educational policy. *Id.* at 208. It is only logical that the burden of proof be placed on the party with the most resources, the specialized knowledge, and who is in the best position to prove that the educational placement for the child is appropriate and that the child should not be mainstreamed with her peers. *Oberti, supra*, 995 F.2d at 1219; *Lascari v. Board of Educ. of Ramapo Indian Hills Regional High Sch. Dist.*, 116 N.J. 30, 44, 560 A.2d 1180, 1188 (1989).

The School Board confuses the issue of "due weight" with the allocation of the burden of proof. "The District Court can give

"due weight" to the agency proceedings (*i.e.*, refrain from imposing its own notions of educational policy on the states), while the ultimate burden of proof remains on the school." *Oberti, supra*, 885 F.2d at 1219.

In view of the IDEA's strong presumption of mainstreaming, it is even more appropriate that the School Board bears the burden of proving why a child should not be mainstreamed. Indeed, requiring Petitioners to prove at the District Court level that the School Board failed to comply with the IDEA would undermine the IDEA's express purpose in ensuring that the rights of disabled children and their parents are protected. Placing the burden of proof on the parents at both the administrative and judicial levels effectively nullifies the presumption in favor of mainstreaming that is integral to the IDEA and denies meaningful judicial review to parents who object to the refusal of their School Board to mainstream. *Id.* at 1218-1219.

The School Board now claims that "the decisions of these tribunals were made based upon a straightforward weighing of all the evidence, independent of the assignment of any burden." Brief in Opposition at 3. Yet, as the Respondent concedes, both the Hearing Officer and the District Court specifically addressed the burden of proof issue. *Id.* at 3, 11. Further, as we show below, if the Court had not relied on legally erroneous decisions, had properly placed the burden of proof of showing cause why Jane Doe should not be mainstreamed on the School Board, and had considered Petitioners' evidence on the merits, the courts would have reached a different decision in this case.

The facts of this case do not present a situation in which the burden of persuasion had to act as a "tie-breaker." Since the Hearing and Review Officers recognized that under the governing case law of the Fourth Circuit the burden of proof was on the parents, they simply wrote their decisions by rewriting the briefs submitted by the School Board. Similarly, the District Court and the Fourth Circuit adopted the School Board's view

of the evidence without considering the merits of the arguments raised by the parents. Petitioners are entitled to fact-finding on the merits of their claim which is untainted by legal error. *Pullman-Standard v. Swint, supra,* 456 U.S. at 292.

II. PETITIONERS HAD A RIGHT TO SUBMIT "ADDITIONAL EVIDENCE"

Respondent tries to convince this Court that there is no confusion among the Circuits as to the appropriate standard for the admission of additional evidence, but fails to address the fact that Petitioners have a fundamental right to present "additional evidence" at the judicial review level pursuant to the plain language of 20 U.S.C. § 1415 (e)(2). The School Board's argument that the District Court did not abuse its discretion in denying the admission of *any* additional evidence is contrary to law and the reasoned opinions of many Circuits. *Id.*

In denying the admissibility of relevant evidence, the District Court imposed a blanket *per se* rule denying the Petitioners' statutory right to introduce any relevant evidence that could not be introduced during the administrative hearings, thereby nullifying § 1415(e)(2). The District Court failed to engage in an informed case-by-case analysis regarding the admissibility of evidence. Dr. Jerome Bruns, Petitioners' expert witness, who spent 25 years as the Director of Student Services of Falls Church City Virginia Public Schools, was certainly "unavailable" to testify at the administrative hearings because he was implementing the mainstreaming requirements of the IDEA in Falls Church, Virginia. If any of the courts below had considered Dr. Bruns' opinion on the merits, J.A. 2074, that court would not have affirmed the administrative decisions.[3]

---

[3] The District Court never addressed the argument raised by the School Board that the testimony of Dr. Bruns was not "sufficiently reliable" to be admissible. *See* Brief in Opposition at 19. In view of Dr. Bruns' extensive

The District Court also erred in refusing to admit the smoking gun memoranda written by the School Board's officials. To claim that these memos were "simply general expressions of personal opinion" is ludicrous. Brief in Opposition at 3. These memos were written by the Superintendent of Arlington Public Schools on official letterhead and reflected the policies and practices of the School Board. *See* Petition 27a - 31a. These official policy papers were compelling enough to persuade the Superintendent to take immediate action by not only calling upon all personnel to examine and consider the systemic violations of the IDEA, but to set into action a corrective plan.[4] *See* Petition 28a-31a.

The School Board, relying on *Walker County Sch. Dist v. Bennett*, 203 F.3d 1293, (11th Cir. 2000) asserts there is no genuine split in the Circuits because the "difference between the First and Sixth Circuits would seem to be more semantical than substantive." *Id.* at 1299. This analysis is misplaced for several reasons.

First, as the Sixth Circuit noted, "additional" has a different meaning than "supplemental" and the strained interpretation given to § 1415(e)(2) by the First and Ninth Circuits is inconsistent with the plain language of the statute. *Metropolitan Gov't of Nashville v. Cook*, 915 F.2d 232, 234 (6th Cir. 1990). Second, the Tenth Circuit, in adopting a view similar to that articu-

---

experience in administering the IDEA, there is no doubt that Dr. Bruns' testimony would meet the standards of *Kumho Tire Co v. Carmichael*, 526 U.S. 137, 142, 145 (1999).

[4] Respondent now argues the smoking gun memoranda were "*apparently* available" to the Petitioners. Brief in Opposition at 21 (emphasis added). This assertion is incorrect.

The fact that Mr. Gosling sought to explain the very existence of these documents during his deposition is entitled to little evidentiary weight because this *fact* witnesss was compensated in connection with *both* his preparation time and his deposition testimony. JA 564-566.

lated by the Sixth Circuit, has concluded there is a division between the circuits on this issue. *Murray v. Montrose County School Dist*, 51 F.3d 921, 930-931, & n. 15 (10th Cir. 1995). Thus, there is a clear split in the Circuits, notwithstanding the Eleventh Circuit's claim that additional and supplemental really mean the same thing.

III. PETITIONERS ARE ENTITLED TO A TRIAL BY JURY

Contrary to Respondent's assertions, Petitioners did not abandon the §504 and § 1983 claims below. They were raised and considered by both the Hearing Officer and the Reviewing Officer. JA 1000, 1204. The Petitioners continued to raise these claims during the judicial proceedings before the District Court. JA 16, 571-578. Moreover, even if Petitioners had not exhausted these claims, there is a split in the Circuits as to whether administrative exhaustion is required. *See* Petition for Writ of Certiorari at 29.

Petitioners are entitled to a jury trial on their § 504 and 1983 claims and these issues should be tried before and decided by a jury, *prior* to issues to be decided by the Court, so that their Seventh Amendment rights are not foreclosed on common factual issues. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990). If the jury finds that the School Board's policy is contrary to § 504 and § 1983 and that Petitioners' rights under these laws have been violated, then these findings are binding on the court's analysis of the IDEA claims, which should be decided only after the jury renders a verdict on Petitioners' damages claim. If Petitioners' § 504 and § 1983 claims were permitted to be tried by a jury first, and they prevailed, the court would not be estopped from giving the appropriate "due weight" to the administrative decisions in deciding the IDEA claims.

The School Board's argument misses the point of Petitioners' claim to a jury trial. If Petitioners have a Seventh Amendment right to a jury trial on their § 504 and § 1983 claims, then

the whole question of Congressional intent is irrelevant: Congress could not deny Petitioners their constitutional right to a jury trial, even if Congress had intended to do so.

CONCLUSION

The decisions of the courts below effectively deny parents any meaningful review of the decisions made by their school boards to deny handicapped children the statutory right to attend school and be mainstreamed with their nondisabled peers. By placing the burden of proof on the parents at the administrative level, by requiring that the administrative findings "are entitled to be considered *prima facie* correct," and by excluding additional evidence, the Fourth Circuit has, in essence, required that the District Court affirm the administrative decisions if such decisions are supported by substantial evidence. This interpretation of the IDEA's review provision was soundly rejected by this Court's opinion in *Rowley*, *supra*, which rejected the substantial evidence standard. *Id.*, 458 U.S. at 205.

We respectfully request the Court to grant the Petition to decide these issues of national importance, to resolve a split among the Circuits and the New Jersey Supreme Court, and to correct the legal errors of the Fourth Circuit. Meaningful access to the courts for parents bringing claims under the IDEA, § 504, and § 1983 should not be a function of geography.

Respectfully submitted,

JOHN F. KARL, JR.*
JODI T. TUER
MCDONALD & KARL
900 17th Street, N.W.
Suite 1250
Washington, D.C. 20006
(202) 293-3200
Counsel for Petitioners

* Counsel of Record